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Supreme Court of the United States

OCTOBER TERM, 1939

No. 271

PARAMINO LUMBER COMPANY and UNION INSURANCE SOCIETY OF CANTON, LTD.,
Appellants,

vs.

WM. A. MARSHALL, Deputy Commissioner, Fourteenth Compensation District Under the Longshoremen's and Harbor Workers' Compensation Act, and JOHN T. CLARK.

IN ADMIRALTY
(Consolidated Causes)

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON.

BRIEF OF APPELLANTS

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IN ADMIRALTY
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APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON.

BRIEF OF APPELLANTS

I
OPINION OF THE COURT BELOW

The opinion of the United States District Court for the Western District of Washington, Northern Division, convoked as a three-judge court pursuant to Judicial Code §266, as amended by Act of August 24, 1937,

chapter 754, section 3, 50 Stat. 752, Title 28 U. S. C. A. §380a, is reported as "*Paramino Lumber Company, et al. v. Marshall, Deputy Commissioner, et al. Nos. 47 and 48*" in 27 F. Supp. 823 (1939 Advance Opinions), and is set out in full in the Appendix hereof (App. 1).[1]

II
JURISDICTION

(a) The jurisdiction of this court is invoked under section 266 of the Judicial Code, as amended by the Act of August 24, 1937, chapter 754, section 3, 50 Stat. 752, Title 28 U. S. C. A., §380a, and Rule 47 of the Revised Rules of the Supreme Court of the United States, effective February 27, 1939.

(b) In these consolidated causes appellants seek interlocutory and permanent injunctions suspending and restraining the enforcement, operation or execution of, or setting aside that certain Private Act of Congress No. 445, entitled "An Act for the Relief of John T. Clark of Seattle, Washington," approved April 10, 1936 (49 Stat. 2244), the validity of which is here involved, upon the ground that such Private Act and the whole thereof is repugnant to the Constitution of the United States and more particularly the Fifth Amendment thereto. Said Private Act is hereinafter set out *verbatim*, as follows:

---

[1]The historical background of these cases may be found under the same title in the decisions of the U. S. District Court, Western District of Washington, 18 F. Supp. 645, and of the U. S. Circuit Court of Appeals for the 9th Circuit, 95 F. (2d) 203. Certiorari denied by this court without opinion October 10, 1938. This action was dismissed upon the ground that the suit was premature, no compensation order or award having at that time been issued pursuant to said Private Act of Congress No. 445.

"An Act—For the Relief of John T. Clark, of Seattle, Washington.

"*Be it enacted by the Senate and House of Representaties of the United States of America in Congress assembled*, That in the case of John T. Clark, of Seattle, Washington, whose disability compensation under the Longshoremen's and Harbor Workers' Compensation Act of March 4, 1927, was terminated as of July 5, 1931, by a compensation order filed August 26, 1931, the Employees' Compensation Commssion be, and it is hereby authorized and directed to review such order in accordance with the procedure prescribed in respect of such claims in section 19 of said Act, and in accordance with such section to issue a new compensation order which may terminate, continue, increase, or decrease such compensation, the provisions of Sections 21 and 22 of the said Act, as amended, to the contrary notwithstanding: Provided, That such new order shall not affect any compensation paid under authority of the prior order.

"Approved, April 10, 1936." (49 Stat. 2244).

(c) The date of the decree to be reviewed is June 9, 1939 (R. 58).

(d) The date upon which the application for appeal was presented is June 19, 1939 (R. 61).

(e) The date upon which these consolidated causes were docketed in this Court is August 7, 1939 (R. 71).

(f) Separate bills of complaint in causes Nos. 47 and 48 (thereafter consolidated and transferred to the admiralty side of the court (R. 52, 58)) were filed in the United States District Court for the Western District of Washington, Northern Division, on March 16, 1939 (R. 1, 21). Temporary restraining orders were entered and filed on March 23, 1939 (R. 38, 40), together with

bond thereon in the amount of $5,000 (R. 43). Motions of the appellee, John T. Clark, to dismiss appellants' bills of complaint in each cause upon the ground that said bills of complaint do not state sufficient facts to constitute a cause of action and for the relief prayed for were filed March 23, 1939 (R. 37). Orders in each cause, convening a three-judge court pursuant to Title 28 U. S. C. A., §380a and setting both causes for hearing and providing for notice thereof to the Attorney General of the United States, were entered and filed by the Honorable John C. Bowen, United States District Judge, on March 29, 1939 (R. 44, 47). Both causes were heard by said three-judge court, consisting of the Honorable John C. Bowen and Edward E. Cushman, District Judges, and the Honorable William Healy, Circuit Judge, on April 24, 1939, and on said date both causes were consolidated for hearing and for all purposes, including appeal, and transferred to the admiralty side of the court (R. 52, 58).[2]

On May 10, 1939, the Honorable Edward E. Cushman and John C. Bowen, District Judges, as a majority of said three-judge court, filed their written opinion in these consolidated causes, and on the same date the Honorable William Healy, United States Circuit Judge, filed his dissenting opinion herein (R. 52, 56), (App. 5). The final decree to be here reviewed, sustaining exceptions to said libels, denying injunctive relief, and dismissing said

[2]In accordance with the practice established by the Circuit Court of Appeals for the Ninth Circuit and approved in Fireman's Fund, etc. v. Otto Hugo and Marshall, 103 F. (2d) 513, 517 (1939), and Kobilkin v. Pillsbury, Deputy Commissioner, 103 F. (2d) 667 (1939).

libels was filed June 9, 1939 (R. 58). Notice of Appeal (R. 67), Petition for Appeal (R. 61), together with Assignment of Errors (R. 63), Jurisdictional Statement pursuant to Supreme Court Rule 12, Par. 1, Citation on Appeal (R. 68), Cost Bond on Appeal (R. 65), Statement Directing Attention to Supreme Court Rule 12, Par. 1, Praecipe for Transcript on Appeal (R. 66), Acknowledgment of Service pursuant to Supreme Court Rule 12, Par. 3 were served on all parties, other than appellants, on June 23, 1939, and filed on June 26, 1939. Appellants' Statement of Points and Designation of Record pursuant to Supreme Court Rule 13, Par. 9 (R. 68) was served on August 2, 1939, and filed in this Court on August 7, 1939. Appellants' Transcript of Record on Appeal was filed in this Court on August 7, 1939.

III
STATEMENT OF THE CASE

In these consolidated suits in admiralty appellants, employer and insurance carrier respectively, under the Longshoremen's and Harbor Workers' Compensation Act (Title 33 U. S. C. A., §901, et seq.), seek temporary, interlocutory and permanent injunctive relief against that certain Private Act No. 445 of the 74th Congress (H. R. 4439) "* * * for the relief of John T. Clark (appellee) of Seattle, Washington," approved April 10, 1936 (49 Stat. 2244) and against a compensation order and award of compensation made solely under the purported authority of said Private Act by Wm. A. Marshall, Deputy Commissioner, (appellee) in favor of said John T. Clark, a longshoreman, upon the ground that said Private Act is unconstitutional and said award made

thereunder void and of no force and effect, since Private Act No. 445 is in violation of the Fifth Amendment to the Constitution of the United States in that it denies to appellants the equal protection of the laws enjoyed by others similarly situated, and grants to appellee John T. Clark special privileges not accorded equally to other employees under the Longshoremen's and Harbor Workers' Act, and deprives appellants of their property without due process of law.

Cause No. 47 was instituted as an independent suit in equity, the bill of complaint therein containing the jurisdictional allegations necessary to confer jurisdiction upon the District Court as a federal court, to-wit: diversity of citizenship and jurisdictional amount in controversy exceeding the sum or value of $3,000, exclusive of interest and costs (R. 2). Cause No. 48 was timely instituted as a suit in equity seeking to review said compensation order and award of compensation (R. 26, 17), pursuant to the procedure prescribed in the Longshoremen's and Harbor Workers' Act for review of compensation orders made thereunder (Title 33 U. S. C. A., §921) (R. 21).

Both causes seeking the same injunctive relief were consolidated and transferred to the admiralty side of the District Court for hearing and all purposes, including appeal (R. 51, 58). Appellee John T. Clark excepted to the libels in both causes upon the ground that the same do not state sufficient facts for the relief prayed for (R. 37, 51).

This is a direct appeal to this court, taken from a final decree sustaining said exceptions, denying injunctive relief and dismissing said libels, as authorized by Judicial

Code Sec. 266, as amended by Act of August 24, 1937, chapter 754, section 3, 50 Stat. 752, Title 28 U. S. C. A., §380a.

The factual background, which more fully appears from the allegations of the libels herein (R. 1, 21), may be summarized as follows:

On January 17, 1931, appellee John T. Clark was in the employ of appellant Paramino Lumber Company (whose insurance carrier under the Longshoremen's and Harbor Workers' Compensation Act (Title 33 U. S. C. A., §901, et seq.) was the Union Insurance Society of Canton, Ltd.), and while engaged as a longshoreman on board the SS. DOROTHY WINTERMOTE, then lying in the navigable waters in the harbor of the City of Seattle, State of Washington, sustained personal injuries in the course of such employment, causing temporary disability under the provisions of the Longshoremen's and Harbor Workers' Compensation Act. Compensation was voluntarily paid to said John T. Clark by appellants, without a compensation order, and thereafter, upon application of said appellee, John T. Clark, a hearing on his claim was held on the 25th day of August, 1931, by appellee Wm. A. Marshall as Deputy Commissioner under the Longshoremen's and Harbor Workers' Compensation Act. Testimony having been taken, the hearing resulted in the filing of a compensation order and award of compensation by said Deputy Commissioner on the 26th day of August, 1931, wherein it was found that the said John T. Clark was wholly disabled from January 17, 1931, to and including July 4, 1931, as a result of the injuries sustained, and further finding that said

John T. Clark had recovered from the said injury and disability occasioned thereby on July 5, 1931 (R. 13).[3] All compensation required to be paid in accordance with said award had been theretofore paid to said John T. Clark by appellants in accordance with the terms of said order (R. 14), in which a proper credit was allowed (R. 14).

Pursuant to the terms and provisions of the Longshoremen's and Harbor Workers' Compensation Act, the compensation order of August 26, 1931, became final at the expiration of the thirtieth day thereafter. (33 U. S. C. A., §921(a)).[4] No proceedings to review, suspend or set aside said order were brought by the appellee John T. Clark or any party in interest, either within thirty days after the filing of said award[5] or otherwise,[6] and the same became final, as provided by law (R. 3, 4, 23).

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[3]Section 19 of the Longshoremen's and Harbor Workers' Compensation Act (33 U. S. C. A., §919) provides for the procedure incident to the hearing of claims and the filing of a compensation order by the Deputy Commissioner. The compensation order and award of August 26, 1931, is set forth in full in Appendix (pp. 8, 9).

[4]Sec. 21a of the Longshoremen's and Harbor Workers' Compensation Act (33 U. S. C. A., §921(a)) so far as here relevant provides: "A compensation order shall become effective when filed in the office of the Deputy Commissioner * * * and, unless proceedings for the suspension or setting aside of such order are instituted as provided in subdivision (b) of this section, *shall become final at the expiration of the thirtieth day thereafter.*"

[5]Sec. 21(b) of the Longshoremen's and Harbor Workers' Act (Title 33 U. S. C. A., §921(b)), so far as is here relevant provides: "If not in accordance with law, the compensation order may be suspended or set aside, in whole or in part, through injunction proceedings, mandatory or otherwise, brought by any party in interest against the Deputy Commissioner making the order, and instituted in the Federal District Court for the judicial district in which the injury occurred * * *. The payment of the amounts

Approximately five years later, the 74th Congress of the United States passed a certain private act entitled "An Act—For the Relief of John T. Clark of Seattle, Washington," which act was approved and signed by the President of the United States on the 10th day of April, 1936, and is set forth in full on page 3, supra.

Thereafter, and on June 17, 1936, said Deputy Commissioner, Wm. A. Marshall, upon application of said John T. Clark, and pursuant to said private act, ordered a further hearing to be held on said claim on the 7th day of July, 1936, in his office, 620 Federal Office Building, Seattle, Washington (R. 15).

Following receipt of said Notice of Hearing (R. 15) appellants, contending that appellee Wm. A. Marshall, as Deputy Commissioner, was without jurisdiction or authority to take any further proceedings in connection

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required by an award shall not be stayed pending final decision in any such proceeding unless upon application for an interlocutory injunction the court, on hearing * * * allows the stay of such payments, in whole or in part, where irreparable damage would otherwise ensue to the employer. * * *."

[6]Sec. 22 of the Longshoremen's and Harbor Workers' Compensation Act (33 U. S. C. A., §922), as *amended May* 26, 1934, *subsequent to the making of the compensation order of August* 26, 1931, so far as is here relevant, provides: "Upon his own initiative, or upon the application of any party in interest, on the ground of a change in conditions or because of a mistake in a determination of fact by the Deputy Commissioner, the Deputy Commissioner may, at any time prior to one year after the date of the last payment of compensation * * * review a compensation case in accordance with the procedure prescribed in respect of claims under Section 19, and in accordance with such section issue a new compensation order which may terminate, continue, reinstate, increase or decrease such compensation. * * *." It will be noted that Private Act No. 445 purports to give appellee John T. Clark the right to have the compensation order filed August 26, 1931, reviewed, the provisions of sections 21 and 22 of the Longshoremen's and Harbor Workers' Compensation Act to the contrary notwithstanding.

with said claim, and contending that said private act of Congress was in violation of and repugnant to the Constitution of the United States, and more particularly the Fifth and Fourteenth Amendments thereto, filed their Bill of Complaint in Equity in the District Court of the United States for the Western District of Washington, Northern Division, seeking to enjoin said appellee Wm. A. Marshall, as Deputy Commissioner, from holding said hearing or taking any further action in connection with said claim. This action was dismissed and the injunctive relief therein sought denied by the District Court upon the ground that the same was premature and the court was therefore without jurisdiction.[7]

On appeal from the order of the District Court dismissing said cause and denying injunctive relief, the Circuit Court of Appeals for the Ninth Circuit affirmed said order upon jurisdictional grounds, stating in its written opinion reported in 95 F. (2d) 203:

> "The power of the court to grant injunctive relief, where irreparable damage would otherwise result to an employer, is to be exerted after the hearing and the making of a compensation order, not before. Until such time, by necessary implication, Congress has withheld from the court the power to act. * * * It is apparent that appellants, by pursuing the administrative and judicial procedure prescribed in the statute itself (Longshoremen's and Harbor Workers' Compensation Act) have an entirely adequate remedy. * * * It would still be inappropriate to rule at this juncture on the abstract question of the constitutionality of the Private Act, since the matter may more intelligently be considered in

[7]Paramino Lumber Company, et al. v. Wm. A. Marshall, et al., 18 F. Supp. 654 (1938).

the light of the concrete facts to which the Act is to be applied, as these are developed in the orderly procedure before the Deputy Commissioner."

Thereafter, an application was made to this Court for a writ of certiorari, which was denied, without opinion, on October 10, 1938.

On November 1, 1938, the appellee Wm. A. Marshall, as Deputy Commissioner, in compliance with and under authority of the provisions of said Private Act of Congress, previously referred to, issued a Notice of Hearing to be held on the 22nd day of November, 1938 (R. 16), on which date said hearing was held and testimony introduced (all over appellants' objections), (R. 8, 26). That said hearing of November 22, 1938, was continued for the taking of further testimony to January 5, 1939, on which date the taking of testimony was concluded (R. 8, 26).

On March 13, 1939, and solely under authority of said Private Act of Congress, the appellee Wm. A. Marshall, as Deputy Commissioner, issued and filed in his office a further compensation order and award of compensation (R. 17) (App.10), in which, among other things, it was found that the appellee John T. Clark was wholly disabled from January 17, 1931, to and including January 5, 1939, for which he was entitled to 415-6/7 weeks' compensation at $11.54 per week, amounting to the sum of $4,798.99, and that the total disability of the appellee John T. Clark continued at the time of the hearing on January 5, 1939, and said order further provided for the payment of compensation to said

John T. Clark by appellants in the sum of $11.54 per week (R. 17, 18).[8]

Following service of said compensation order of March 13, 1939 (R. 17), appellants on March 16, 1939, filed their bills of complaint (libels) in these consolidated actions, seeking the relief against said Private Act and said award made thereunder, previously noted (R. 1, 21).

True copies of the bills of complaint (libels) in both causes were forthwith served upon the appellees Wm. A. Marshall and John T. Clark, together with a motion for a temporary restraining order and preliminary injunction (R. 35, 36), which said motion came on for hearing before the District Court, and temporary restraining orders were granted in both causes (R. 38, 40), and a bond thereon in the amount of $5,000 was approved and filed (R. 43), thus temporarily enjoining the payments required to be made by appellants to the appellee John T. Clark, as provided in said compensation order.

On March 29, 1939, an order was entered in each of said causes, convening a three-judge court, providing

[8] "That the employer, SS. 'Dorothy Wintermore' and/or Paramino Lumber Company, and the insurance carrier, Union Insurance Society of Canton, Ltd., shall pay to the claimant compensation as follows: 415-6/7 weeks' compensation at $11.54 per week covering the period from January 17, 1931, to and including January 5, 1939, and amounting to the sum of $4,798.99, less $200.00 to be deducted therefrom and paid Oscar A. Zabel as his attorney; that the employer shall have credit on this award for $331.20 previously paid to the claimant as compensation; that subsequent to January 5, 1939, the employer and insurance carrier shall pay compensation to the claimant bi-weekly at the rate of $11.54 per week; that the employer and insurance carrier shall furnish claimant with such medical, surgical and hospital treatment as may be appropriate to the further treatment and cure of his disability." (R. 18). The compensation order and award of March 13, 1939, is set forth in full in Appendix (pp. 10-12).

for notice thereof to the Attorney General of the United States, as required by Act of August 24, 1937, chapter 754, section 3, 50 Stat. 752, Title 28 U. S. C. A., §380a (R. 44, 47). On April 24, 1939, these consolidated causes were heard by said three-judge court thus convoked, and thereafter, on May 10, 1939, the Honorable Edward E. Cushman and John C. Bowen, District Judges, filed their written decision therein, and on said date the Honorable William Healy, United States Circuit Judge, filed his dissenting written decision therein (R. 52, 53, 56) (App. 1).

On June 9, 1939, a final decree was entered in said consolidated causes, sustaining the exceptions to said libels, denying the injunctive relief prayed for and dismissing said causes, from which final decree this appeal is taken (R. 58).

IV

SPECIFICATION OF ERRORS

The United States District Court for the Western District of Washington, Northern Division, erred in the following particulars:

1. In granting and in not denying and overruling the exceptions of the appellee John T. Clark to said libels herein and each of them, in that it appears from said libels and each of them that the facts therein alleged are sufficient to constitute a cause of action for the injunctive relief sought therein, and that Private Act No. 445 of the 74th Congress of the United States (49 Stat. 2244), pursuant to which the appellee Wm. A. Marshall, as Deputy Commissioner, under the Long-

shoremen's and Harbor Workers' Compensation Act, purported to have obtained authority to and did review the compensation order and award of compensation of August 26, 1931 (R. 13), and pursuant to which said appellee purported to have obtained authority to and did issue and file a further compensation order and award of compensation on the 13th day of March, 1939 (R. 17), is unconstitutional and void, being in violation of the Fifth Amendment to the Constitution of the United States in granting to appellee John T. Clark special privileges not accorded equally to other employees subject to the Longshoremen's and Harbor Workers' Compensation Act, and denying to appellants the equal protection of the laws enjoyed by other employers under the Longshoremen's and Harbor Workers' Compensation Act, similarly situated, and in depriving appellants of their property without due process of law.

2. In denying and in not granting the applications of the appellants and each of them for an interlocutory or permanent injunction in said consolidated causes, in that it appears from said libels and each of them that the facts therein alleged are sufficient to constitute a cause of action for the injunctive relief sought therein, and that Private Act No. 445 of the 74th Congress of the United States (49 Stat. 2244), pursuant to which the appellee Wm. A. Marshall, as Deputy Commissioner, under the Longshoremen's and Harbor Workers' Compensation Act, purported to have obtained authority to and did review the compensation order and award of compensation of August 26, 1931 (R. 13), and pursuant to which said appellee purported to have obtained

authority to and did issue and file a further compensation order and award of compensation on the 13th day of March, 1939 (R. 17), is unconstitutional and void, being in violation of the Fifth Amendment to the Constitution of the United States in granting to appellee John T. Clark special privileges not accorded equally to other employees subject to the Longshoremen's and Harbor Workers' Compensation Act, and denying to appellants the equal protection of the laws enjoyed by other employers under the Longshoremen's and Harbor Workers' Compensation Act, similarly situated, and in depriving appellants of their property without due process of law.

3. In dismissing these consolidated causes and the libels therein, and each of them, in that it appears from the libels and each of them that the facts alleged are sufficient to constitute a cause of action for the injunctive relief sought therein, and that Private Act No. 445 of the 74th Congress of the United States (49 Stat. 2244), pursuant to which the appellee Wm. A. Marshall, as Deputy Commissioner under the Longshoremen's and Harbor Workers' Compensation Act, purported to have obtained authority to and did review the compensation order and award of compensation of August 26, 1931 (R. 13), and pursuant to which said appellee purported to have obtained authority to and did issue and file a further compensation order and award of compensation on the 13th of March, 1939 (R. 17), is unconstitutional and void, being in violation of the Fifth Amendment to the Constitution of the United States in granting to appellee John T. Clark special privileges not accorded

equally to other employees subject to the Longshoremen's and Harbor Workers' Compensation Act, and denying to appellants the equal protection of the laws enjoyed by other employers under the Longshoremen's Compensation and Harbor Workers' Act, similarly situated, and in depriving appellants of their property without due process of law.

V

ARGUMENT

Summary of Argument

INTRODUCTORY

POINT A:

PRIVATE ACT NO. 445 GRANTS TO APPELLEE, JOHN T. CLARK, SPECIAL PRIVILEGES NOT ACCORDED EQUALLY TO OTHER LONGSHOREMEN SIMILARLY SITUATED, AND DENIES TO APPELLANTS THE EQUAL PROTECTION OF THE LAWS ENJOYED BY OTHER EMPLOYERS SIMILARLY SITUATED UNDER THE LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT.

1. "Due process of law" has the same meaning in both the Fifth and Fourteenth Amendments to the Constitution of the United States.

2. "Due process of law" is equivalent to the "law of the land" requiring equal treatment of all persons similarly situated, and affords complete protection against arbitrary classification and discrimination by Congress.

POINT B:

PRIVATE ACT NO. 445 OF THE 74TH CONGRESS DEPRIVES APPELLANTS OF THEIR PROPERTY WITHOUT DUE PROCESS OF LAW BY DESTROYING PROPERTY RIGHTS VESTED UNDER A PRIOR FINAL COMPENSATION ORDER MADE PURSUANT TO THE PROVISIONS OF THE LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT.

1. The compensation order and award of August 26, 1931, is a final adjudication conferring upon appellants vested property rights.

2. The review authorized by Private Act No. 445 destroys the rights and obligations which were finally determined by the order and award of August 26, 1931.

3. Private Act No. 445 deprives appellants of substantive rights and is not merely procedural.

4. Private Act No. 445 attempts to create a new substantive right for the benefit of appellee John T. Clark and is not merely an amendment to the Longshoremen's and Harbor Workers' Compensation Act.

5. Private Act No. 445 is an attempted usurpation by Congress of judicial functions.

POINT C:

ILLUSTRATIVE DECISIONS CONSTRUING SIMILAR STATE ACTS.

ARGUMENT

Introductory

This appeal and the argument to follow relate solely to the constitutionality of Private Act No. 445 of the 74th Congress, entitled "An Act—For the Relief of John T. Clark of Seattle, Washington,"[9] and *a fortiori* the validity of the compensation order of March 13, 1939,[10] made by appellee Wm. A. Marshall, Deputy Commissioner, under the purported authority thereof.

The points raised by the Specification of Errors (pp. 13-16, supra) will be here dealt with and discussed under two main headings noted in the preceding Summary of Argument as *Point A* and *Point B*, under which the nature and effect of said Private Act No. 445 will be tested by the constitutional requirements of the "due process" clause of the Fifth Amendment to the Constitution of the United States.

Point C will be devoted to the discussion of the decisions of State Courts construing similar state legislation.

Preliminarily, we invite the Court to here consider the exact text of Private Act No. 445, which we quote as follows:

"AN ACT

"For the relief of John T. Clark, of Seattle, Washington.

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[9] 49 Stat. 2244.

[10] R. 17.

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That in the case of John T. Clark, of Seattle, Washington, whose disability compensation under the Longshoremen's and Harbor Workers' Compensation Act of March 4, 1927, was terminated as of July 5, 1931, by a compensation order filed August 26, 1931, the Employees' Compensation Commission be, and it is hereby authorized and directed to review such order in accordance with the procedure prescribed in respect of such claims in section 19 of said Act, and in accordance with such section to issue a new compensation order which may terminate, continue, increase, or decrease such compensation, the provisions of Sections 21 and 22 of the said Act, as amended, to the contrary notwithstanding: Provided, That such new order shall not affect any compensation paid under authority of the prior order.

"Approved, April 10, 1936." (49 Stat. 2244).

It will be observed that the very title of the Private ct discloses its "private" and special nature, being An Act—for the Relief of John T. Clark, of ashington," singling out and conferring its benefits on but one individual in a class of workmen subject the provisions of the Longshoremen's and Harbor orkers' Compensation Act.

The Private Act then proceeds to authorize a special view by the Employees' Compensation Commission of compensation order filed August 26, 1931 (R. 13), in hich disability compensation under the Longshoremen's nd Harbor Workers' Compensation Act was, after a ll hearing, terminated as of July 5, 1931, such review be in accordance with the procedure prescribed by ction 19 of the Longshoremen's and Harbor Workers'

Compensation Act, notwithstanding the plain prohibitions contained in Sections 21 and 22 of said Act[11] then and now in full force and effect and applicable to all other employees subject to its provisions. Similarly, the Private Act is applicable to but one employer and one insurance carrier (these appellants) and exhausts itself upon them alone, leaving available to all other employers and insurance carriers under the Longshoremen's and Harbor Workers' Compensation Act, similarly situated, the protection of finality afforded by Sections 21 and 22 of said Act, above noted. In short, Private Act No. 445 is patently discriminatory by arbitrarily singling out one employee of a class for its benefits and one employer and insurance carrier of a class for its burdens.

We are not here dealing with a congressional act predicated upon "natural and reasonable classification" since the plain wording of Private Act No. 445 forecloses the possibility of any such contention or construction. Previous decisions of this Court upholding congressional legislation founded upon "natural and reasonable classification" are therefore irrelevant to this inquiry.[12]

The finality of the compensation order of August 26, 1931, which confessedly involved no fraud, (R. 57) is recognized in the context of the Private Act, which then

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[11]See full text of Sections 21 and 22 of the Longshoremen's and Harbor Workers' Compensation Act set out in footnotes, pp. 8, 9, supra.

[12]Compare—

Charles C. Steward Mach. Co. v. Davis, 301 U. S. 548, 584, 81 L. ed. 1279, 1289 (1937); Barclay & Co. v. Edwards, 267 U. S. 442, 69 L. ed. 703 (1929); Nebbia v. N. Y., 291, U. S. 502, 525, 78 L. ed. 940, 950 (1934); State Tax Commission v. Jackson, 283 U. S. 527, 542, 75 L. ed. 1248, 1258 (1931).

proceeds to strike down the rights thus vested in appellants thereunder by directing a review and the issuance of a new compensation order despite "the provisions of Sections 21 and 22 of the said Act, as amended, to the contrary notwithstanding."

It must be noted that the obligations which arise from a compensable "injury"[13] within the purview of the Longshoremen's and Harbor Workers' Compensation Act are private rights as distinguished from those which arise between the Government and persons subject to its authority in connection with the performance of the constitutional functions of the Executive or Legislative Departments. The obligations thus created relate to the liability of one individual to another under the law as then existing and defined. *Crowell v. Benson*, 285 U. S. 22, 51, 76 L. ed. 598, 613 (1932). Clearly, the compensation order of August 26, 1931, was a final adjudication of such private rights between these appellants and appellee John T. Clark under the existing law.[14]

Private Act No. 445 does not involve the "spending power" of Congress but, on the contrary, and as stated by Circuit Judge William Healy in his dissenting opinion in this case in the District Court, "What Congress has done is to authorize an award of money for the relief of a private individual, payable not out of the public treasury, but out of the pockets of other private parties guilty of no fault."[15]

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[13]"Injury" and "Compensation" are defined in Sec. 902 of the Longshoremen's and Harbor Workers' Compensation Act (Title 33 U. S. C. A., §902 (2), (12)).

[14]Title 33 U. S. C. A., §921 (a) and cases cited at p. 44, infra.

[15]Paramino Lumber Co. et al. v. Marshall, et al., 27 F. Supp. 823, 825 (1939) (App. 6).

The Private Act under consideration is a classical example of tyrannical legislation—it establishes government by edict or discriminatory order and discards government by law. It is difficult to fathom the factors which motivated Congress in its passage when we consider that the unconstitutionality of Private Act No. 445 was recognized by the Senate Committee on Claims in its report No. 1645 of the 74th Congress of the United States, wherein it is stated in reference thereto:

> "Your Committee is frank to admit that it has had no other cases of this kind, and that, as stated by the Employees' Compensation Commission, a Private Act of this nature might be successfully attacked by the employer or the insurance company in the courts." (R. 5, 25) (App. 18).

Indeed, the United States Employees' Compensation Commission, whom appellee, Wm. A. Marshall, Deputy Commissioner, represents, in a communication addressed to the Senate Committee on Claims, and contained in the committee report above referred to, likewise recognized the unconstitutionality of Private Act No. 445, stating in reference thereto:

> "The proposed measure, * * * would no doubt be open to objection on constitutional grounds, among other things, because of its discriminatory nature in that it would grant a special privilege not accorded equally to other employees under the Act. It would also disturb vested rights. Similar state acts, so far as the Commission has noted, have uniformly been held unconstitutional or invalid, and in this connection the committee's attention is called to the following illustrative cases: Casieri's case (190 N. E. 118, Mass. 1934); and Roles Shingle Company v. Bergerson (19 Pac. (2d) 94, Ore. 1933).

"Aside from the fact that the draft of the proposed bill would impose upon the Commission a function in this particular case which is in the nature of a duty imposed under the Longshoremen's Act upon its deputy commissioners, the constitutional infirmity of the measure would leave little doubt that any order issued thereunder would be successfully attacked in court by the employer or insurance carrier." (R. 5, 6, 25) (App. 25).

The passage of this Private Act by Congress despite its obvious constitutional infirmities, as reflected by the report of the Senate Committee on Claims and the opinion of the United States Employees' Compensation Commission above set forth, serves to illustrate the more clearly the effects of political meddling upon a system of workmen's compensation, the social benefits of which cannot be seriously questioned or denied. Should such Private Act be permitted to stand unchallenged, the entire compensation law and system designed for the benefit of federal employees or workmen within the purview of the Longshoremen's and Harbor Workers' Compensation Act would be thrown into a state of confusion and turmoil, placing a premium upon political influence, with the result that the benefits to accrue to injured workmen under the Compensation Act would be measured only by their political potency, at the same time subjecting an injured employee's rights to the political manipulation of an unscrupulous employer or insurance carrier. The wisdom of the Fifth Amendment to the Constitution of the United States is best illustrated by contemplating the results which could follow a judicial declaration of the validity of such a Private Act as is now before this Court.

It is submitted that Private Act No. 445 is unconstitutional and the compensation order and award of March 13, 1939, made pursuant thereto, void, because said Private Act is repugnant to the "due process" clause of the Fifth Amendment to the Constitution of the United States in that:

POINT A:

PRIVATE ACT NO. 445 GRANTS TO APPELLEE JOHN T. CLARK SPECIAL PRIVILEGES NOT ACCORDED EQUALLY TO OTHER LONGSHOREMEN SIMILARLY SITUATED AND DENIES TO APPELLANTS THE EQUAL PROTECTION OF THE LAWS ENJOYED BY OTHER EMPLOYERS SIMILARLY SITUATED UNDER THE LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT.

1. "Due process of law" has the same meaning in both the Fifth and Fourteenth Amendments to the Constitution of the United States.

It has been frequently pointed out and is now well settled that the phrase "due process of law" has the same meaning in both the Fifth and Fourteenth Amendments. *Twining v. New Jersey*, 211 U. S. 78, 100, 101, 53 L. ed. 97, 107 (1908); *U. S. v. Armstrong*, 265 Fed. 683, 690 (D. C. Ind., 1920); *Heiner v. Donnan*, 285 U. S. 312, 326, 76 L. ed. 772, 779 (1932); *Bartlett Trust Co. v. Elliott*, 30 F. (2d) 700, 701 (D. C. Mo., 1929); *Hibben v. Smith*, 191 U. S. 310, 325, 48 L. ed. 195, 201 (1903).

For example, in *Twining v. New Jersey*, 211 U. S. 78, 100, 101, 53 L. ed. 97, 107 (1908), this Court said:

"First. What is due process of law may be ascertained by an examination of those settled usages and modes of proceedings existing in the common and statute law of England before the emigration of our ancestors, and shown not to have been unsuited to their civil and political condition by having been acted on by them after the settlement of this country. This test was adopted by the court, speaking through Mr. Justice Curtis, in Den ex dem. Murray v. Hoboken Land & Improv. Co. 18 How. 272, 280, 15 L. ed. 372, 376 (approved in Hallinger v. Davis, 146 U. S. 314, 320, 36 L. ed. 986, 989, 13 Sup. Ct. Rep. 105; Holden v. Hardy, 169 U. S. 366, 390, 42 L. ed. 780, 790, 18 Sup. Ct. Rep. 383; but see Lowe v. Kansas, 163 U. S. 81, 85, 41 L. ed. 78, 79, 16 Sup. Ct. Rep. 1031). *Of course, the part of the Constitution then before the court was the 5th Amendment. If any different meaning of the same words, as they are used in the 14th Amendment, can be conceived, none has yet appeared in judicial decision.*"*

And in *U. S. v. Armstrong*, 265 Fed. 683, 690 (D. C. Ind., 1920), it was said:

"By the simplest and plainest rules of construction, the words 'due process of law' must have the same meaning in the Fifth and Fourteenth Amendments."

See McGehee, *Due Process of Law* (1906), pp. 30-35.

2. "Due process of law" is equivalent to the "law of the land" requiring equal treatment of all persons similarly situated and affords complete protection against arbitrary classification and discrimination by Congress.

The phrase "due process of law," as used in the Fifth and Fourteenth Amendments, is derived from and has the same meaning as the "law of the land" as used in

*All italics supplied unless otherwise indicated.

Magna Charta, and embodies those same principles of justice and equal treatment of all men which inhere in the common law tradition. *Murray's Lessee v. Hoboken Land & Improv. Co.*, 18 How. 272 (U. S. 1856); *Davidson v. New Orleans*, 96 U. S. 97, 24 L. ed. 616 (1877); *Bank of Columbia v. Okely*, 4 Wh. 235, 244 (U. S. 1819); *Ochoa v. Hernandez Y Morales*, 230 U. S. 139, 57 L. ed. 1427 (1913).

Originally, the "law of the land" in England was viewed as a curb on the executive branch of government only. *Hurtado v. California*, 110 U. S. 516, 531, 532, 28 L. ed. 232, 237 (1884); *Missouri Pacific Ry. Co. v. Humes*, 115 U. S. 512, 519, 29 L. ed. 463, 465 (1885). However, it is now clear that the protection afforded by "due process of law" also extends to legislative action and judicial proceedings as well. *Missouri Pacific Ry. Co. v. Humes*, supra; *Murray's Lessee v. Hoboken Land & Improv. Co.*, supra; *Ex Parte Virginia*, 100 U. S. 339, 25 L. ed. 676 (1879).

While the *ideal of equal treatment* has been frequently said by this Court to inhere in the concept of "due process of law," perhaps the best exposition of this often-used but seldom-defined concept may be found in *Hurtado v. California*, 110 U. S. 516, 535, 536, 28 L. ed. 232, 238 (1884), in which this Court said:

> "* * * Due process of law in the latter (Fifth Amendment) refers to that law of the land which derives its authority from the legislative powers conferred upon Congress by the Constitution of the United States, exercised within the limits therein prescribed, and interpreted according to the principles of the common law. In the Fourteenth Amendment, by parity of reason, it refers to that law of the land in each State, which derives its authority

from the inherent and reserved powers of the State, exerted within the limits of those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions, and the greatest security for which resides in the right of the people to make their own laws, and alter them at their pleasure.

" * * * *

"But it is not to be supposed that these legislative powers are absolute and despotic, and that the amendment prescribing due process of law is too vague and indefinite to operate as a practical restraint. *It is not every act, legislative in form, that is law. Law is something more than mere will exerted as an act of power. It must be not a special rule for a particular person or a particular case,* but, in the language of Mr. Webster, in his familiar definition, 'the general law, a law which hears before it condemns, which proceeds upon inquiry, and renders judgment only after trial,' so 'that every citizen shall hold his life, liberty, property and immunities under the protection of the general rules which govern society,' and *thus excluding, as not due process of law,* acts of attainder, bills of pains and penalties, acts of confiscation, *acts reversing judgments, and acts directly transferring one man's estate to another,* legislative judgments and decrees, *and other similar special, partial and arbitrary exertions of power under the forms of legislation.* Arbitrary power, enforcing its edicts to the injury of the persons and property of its subjects, is not law, whether manifested as the decree of a personal monarch or of an impersonal multitude. *And the limitations imposed by our constitutional law upon the action of the governments, both State and national, are essential to the preservation of public and private rights, notwithstanding the representative character of our political institutions.* The enforcement of these limitations by judicial process is the device of self-governing communities to protect the rights of individuals and minorities, as well against the power of numbers, as against the violence

of public agents transcending the limits of lawful authority, even when acting in the name and wielding the force of the government."

The following cases likewise clearly demonstrate that arbitrary classification or discrimination by Congress is repugnant to the "due process" clause of the Fifth Amendment.

In *U. S. v. Armstrong*, 265 Fed. 683, 691 (D. C. Ind., 1920), the Court, in dealing with the Lever Act, which exempted from its operation farmers' and cooperative societies, considered the Fifth Amendment, stating:

> "It has been repeatedly held that the phrase 'law of the land,' as used in state constitutions, imports a general public law clearly binding upon every member of the community, which embraces all persons who are in or who may come into like situations and circumstances, and not partial laws affecting the rights of classes of individuals, and when applied to special or class legislation, it means in addition to that 'the classification must be natural and reasonable, not arbitrary and capricious.' "

and, quoting from Willoughby on the Constitution in this connection, said:

> "And Willoughby on the Constitution, pp. 873, 874, says:
>
> " 'The United States is not by the Constitution expressly forbidden to deny to any one the equal protection of the laws, as are the states by the first section of the Fourteenth Amendment. It would seem however, that the broad interpretation which the prohibition as to "due process of law" has received is sufficient to cover very many of the acts which, if committed by the states, might be attacked as denying equal protection. *Thus it has been repeatedly declared that enactments of a Legislature directed against particular individuals or corporations,*

or classes of such, without any reasonable ground for selecting them out of the general mass of individuals or corporations, *amounts to a denial of due process of law* so far as their life, liberty or property is affected. One of the requirements of due process of law, as stated by the Supreme Court, is that the laws "operate on all alike," and do not subject the individual to an arbitrary exercise of the powers of government.'"

and in conclusion, stated:

"Hence I conclude that *an arbitrary classification by Congress is repugnant to the 'due process' clause of the Fifth Amendment. The power to make an arbitrary classification is arbitrary power, and arbitrary power has no place in our system of government. Ours is a government of law, not of men.*"

And in *U. S. v. Yount*, 267 Fed. 861, 863 (D. C. Pa., 1920), the court, in considering the Fifth Amendment, said:

"First. The 'due process of law,' by which Congress is limited in the Fifth Amendment, and the states by the Fourteenth Amendment, is equivalent to the 'law of the land,' and is intended to protect the citizen against arbitrary action, and secure to all persons equal and impartial justice under the law. * * *

"Second. *It seems reasonably clear that the 'due process of law' provision of the Fifth Amendment is broad enough in its scope and purpose to include the 'equal protection of the laws,' which no state may deny to any person under the provisions of the Fourteenth Amendment.* Leeper v. Texas, 139 U. S. 462, 11 Sup. Ct. 577, 35 L. ed. 225; Glozza v. Tiernan, 148 U. S. 657, 13 Sup. Ct. 721, 37 L. ed. 599."

In *Leeper v. Texas*, 139 U. S. 462, 468, 35 L. ed. 225, 227 (1891), it was said:

"* * * Due process is so secured by laws operating on all alike, and not subjecting the individual to the arbitrary exercise of the powers of government, unrestrained by the established principles of private right and distributive justice."

And in *Giozza v. Tiernan*, 148 U. S. 657, 662, 37 L. ed. 599, 601 (1893), it was again said:

"* * * And due process of law within the meaning of the amendment is secured if the laws operate on all alike, and do not subject the individual to an arbitrary exercise of the powers of government."

In *Bank of Columbia v. Okely*, 4 Wh. 235, 244 (U. S. 1819), it was said:

"* * * As to the words from Magna Charta, incorporated into the constitution of Maryland, after volumes spoken and written with a view to their exposition, the good sense of mankind has at length settled down to this: that they were intended to secure the individual from the arbitrary exercise of the powers of government, unrestrained by the established principles of private rights and distributive justice."

In *Caldwell v. Texas*, 137 U. S. 692, 697, 34 L. ed. 816, 818 (1891), it was said:

"* * * And due process is so secured by laws operating on all alike, and not subjecting the individual to the arbitrary exercise of the powers of government, unrestrained by the established principles of private right and distributive justice."

In *Southern Bell Telephone & Telegraph Co. v. Calhoun*, 287 Fed. 381, 384 (D. C. S. C., 1923), the court stated:

"* * * It is an essential characteristic of a democratic government that its citizens shall equally enjoy the protection of its laws, and that no one shall be deprived of his property without due process of law. Any form of government, therefore, in which

an opposite policy prevails or is permitted, is by such fact, in the universal estimation of mankind, characterized as arbitrary and despotic. It is true that theoretically at least a democracy may enact laws as discriminatory and tyrannical as an absolute monarchy, and the modern world is not without striking and tragic examples thereof. Happily, however, a different system prevails in America, and constitutional barriers have been erected by state and nation against any governmental exercise of unfair discrimination against any citizen and against arbitrary confiscation of his property."

In *U. S. v. Ballard*, 12 F. Supp. 321, 326, 327 (D. C. Ky., 1935), we find:

" * * * 'Due process of law' has been defined many times as meaning the law of the land, and *the law of the land implies a general public law equally binding upon every member of the community, which embraces all persons who are in, or who may come into, like situations and circumstances, and not partial laws affecting rights of classes of individuals;* and when applied to special or class legislation, it means in addition that the classification must be natural and reasonable, not arbitrary and capricious. *Purely arbitrary orders directed against individuals or classes are not the law of the land.* One of the requirements of the Fifth Amendment is that no person shall be deprived of life, liberty, or property without due process of law."

And in *Wallace v. Currin*, 95 F. (2d) 856, 867 (C. C. A. 4, 1938), it is said:

"It is true that arbitrary discrimination between persons in similar circumstances would violate the due process clause; * * *."

and this Court on appeal in the case of *Currin v. Wallace*, 83 L. ed. Adv. Op. 413, 419 (1939), said:

"If it be assumed that there might be discrimina-

tion of such an injurious character as to bring into operation the due process clause of the Fifth Amendment, that is a different matter from a contention that mere lack of uniformity in the exercise of the commerce power renders the action of Congress invalid."

In *Pryor v. Western Paving Co.*, 184 Pac. 88, 90 (Okla., 1919), the court stated:

"* * * But in its most accepted and best understood application, *due process of law simply means a general and public law operating equally on all persons in like circumstances.* It does not mean a partial law operating upon the rights of a particular person, or exhausting itself upon his life, liberty, or property in a way in which the same rights of all persons in like circumstances are not affected. *The law must embrace and affect the rights of all persons in like circumstances equally*, and the law must be just and reasonable, and not arbitrary and capricious. *It is a denial of due process of law to single out an individual of a particular class and hamper him with the imposition of restraint*, not borne by all members of the same class or community at large. A law operating and exhausting itself upon the rights of a particular person, denying him rights that are enjoyed by others in the community as a whole, must fall, as it denies equal protection of the law."

In the leading case of *Vanzant v. Waddel*, 2 Yerg. 260, 269, 270 (Tenn., 1829), it was stated:

"The clause 'law of the land,' means a general and public law, equally binding upon every member of the community. * * * The right to life, liberty and property, of every individual must stand or fall by the same rule or law that governs every other member of the body politic, or 'land,' under similar circumstances; and every partial or private law, which directly proposes to destroy or affect individual rights, or does the same thing by afford-

ing remedies leading to similar consequences, is unconstitutional and void. Were this otherwise, odious individuals and corporate bodies would be governed by one rule, and the mass of the community who made the law, by another. The idea of a people through their representatives making laws whereby are swept away the life, liberty and property of one or a few citizens, by which neither the representatives nor their other constituents are willing to be bound, is too odious to be tolerated in any government where freedom has a name. Such abuses resulted in the adoption of Magna Charta in England, securing the subject against odious exceptions, which is, and for centuries has been, the foundation of English liberty. Its infraction was a leading cause why we separated from that country, and its value as a fundamental rule for the protection of the citizen against legislative usurpation was the reason of its adoption as part of our constitution."

In the case of *Sims v. Rives*, 84 F. (2d) 871, 878 (C. A. D. C., 1936), (Cert. denied 298 U. S. 682, 80 L. ed. 1402 (1936)), the Court of Appeals for the District of Columbia in considering the effect of the Fifth Amendment, said:

"Within its plenary power to legislate for the District of Columbia, Congress is, of course, subject to all of the constitutional limitations upon the exercise of federal power, including the Fifth Amendment. This is recognized in Capital Traction Com- v. Hof, and District of Columbia v. Kraft, supra. The Fifth Amendment as applied to the District of Columbia implies equal protection of the laws. Lappin v. District of Columbia, 22 App. D. C. 68. But equal protection of the laws means merely that a law must deal alike with all of a given class within the jurisdiction to which the law is applicable."

See also *Maxwell v. Dow*, 176 U. S. 581, 44 L. ed. 597 (1900); *Barclay v. Edwards*, 267 U. S. 442, 450, 69 L. ed. 703 (1924).

Compare the dicta in *Truax v. Corrigan*, 257 U. S. 312, 331, 332, 66 L. ed. 254, 262, 263 (1921), wherein a distinction between "due process" and "equal protection" was suggested.[16] In this connection it will be observed that the suggested distinction shares with others on the same topic a tendency toward generality, toward definiteness in form, but a vagueness in content.

It seems clear, therefore, that the "due process of law" provision of the Fifth Amendment is broad enough

[16] In Truax v. Corrigan, 257 U. S. 312, 331, 332, 66 L. ed. 254, 262, 263 (1921), it was stated:

"This brings us to consider the effect in this case of that provision of the Fourteenth Amendment which forbids any state to deny to any person the equal protection of the laws. The clause is associated in the amendment with the due process clause and it is customary to consider them together. It may be that they overlap, that a violation of one may involve at times the violation of the other, but the spheres of the protection they offer are not coterminous. * * * The due process clause requires that every man shall have the protection of his day in court and the benefit of the general law, a law which hears before it condemns, which proceeds not arbitrarily or capriciously but upon inquiry, and renders judgments only after trial, so that every citizen shall hold his life, liberty, property and immunities under the protection of the general rules which govern society. * * * It of course, tends to secure equality of law in the sense that it makes a required minimum of protection for every one's right of life, liberty and property, which the congress or the legislature may not withhold. Our whole system of law is predicated on the general fundamental principle of equality of application of the law. 'All men are equal before the law,' 'This is a government of laws not of men,' 'No man is above the law,' are all maxims showing the spirit in which legislatures, executives and courts are expected to make, execute and apply laws. But the framers and adopters of this amendment were not content to depend on a mere minimum secured by the due process clause, or upon the spirit of equality which might not be insisted on by local public opinion. They therefore embodied that spirit in a specific guaranty.

"The guaranty was aimed at undue favor and individual or class privilege, on the one hand, and at hostile discrimination or the oppression of inequality, on the other. It sought an equality of treatment of all persons, even though all enjoyed the protection of due process."

in its scope and purpose to include the "equal protection" clause specifically set forth in the Fourteenth Amendment when testing and applied to congressional legislation of an arbitrary or discriminatory nature, not founded upon natural or reasonable classification. This principle has found almost universal recognition among text writers.

For example, in *Willoughby on the Constitution* (2nd Ed.), (1929), pages 1928, 1929, it is said:

> "* * * it is still difficult to say precisely in what specific respects the prohibition of the denial of equal protection of the laws operates to impose restraints not already covered by the prohibition with regard to the depriving of persons of life, liberty or property without due process of law. * * *.
>
> "From what has been said it is clear that in many cases laws which have been held invalid as denying due process of law might also have been so held as denying equal protection of the law or vice versa, and that, in fact, in not a few cases the courts have referred to both prohibitions leaving it uncertain which prohibition was deemed the most pertinent and potent in the premises."

And again, in *Story on the Constitution* (5th Ed.), (1891), pages 705, 706, the learned author states:

> "The provision that no state 'shall deny to any person within its jurisdiction the equal protection of the law' would not seem to call for much remark. Unquestionably every person—all now being free men—is entitled to the equal protection of the laws without any such express declaration.
>
> "* * * *
>
> "It is to be observed further, that this clause, of its own force neither confers it nor gives privileges; its sole office is to ensure impartial legal protection to such as under the laws may exist. It is a formal declaration of the great principle that has been

justly said to pervade and animate the whole spirit of our constitution of government that all are equal before the law: * * *."

The restraint imposed upon Congress by the Fifth Amendment against arbitrary discrimination was plainly applied in *Lappin v. District of Columbia*, 22 App. D. C. 68, 75 (1903), in which a congressional act imposing license fees on persons doing business in the District of Columbia, making a distinction between residents and non-residents, was held unconstitutional on the ground that it was discriminatory, and hence a taking of property without due process of law. The court declared:

> "It must be conceded that the Fourteenth Amendment, which expressly declares that no state shall deny to any person within its jurisdiction the equal protection of the laws, does not purport to extend to authority exercised by the United States. (Citing cases). But it does not follow that Congress in exercising its power of legislation within and for the District of Columbia may, therefore, deny to persons residing therein equal protection of the laws.
>
> "All of the guarantees of the Constitution respecting life, liberty, and property are equally for the benefit and protection of all citizens of the United States residing permanently or temporarily within the District of Columbia, as of those residing in the several states. (Citing cases).
>
> "The statute, as we are constrained to regard it, by imposing an unreasonable burden upon the right of a citizen to pursue a lawful occupation open to his competitors, upon less onerous terms—which right of occupation is, as we have seen, of the nature of property—operates substantially as the taking of property without due process of law, and is therefore within the prohibition of the Fifth Amendment of the Constitution."

While it may be true that the states are inhibited by "specific guaranty" of equal treatment (Fourteenth mendment), nevertheless if anything may be regarded s firmly settled in our constitutional form of government s regards that often used, but seldom defined concept due process of law" as contained in both the Fifth and ourteenth Amendments, it is: that due process of w" is violated by a legislative, executive or judicial xertion of power founded upon arbitrary discrimination. uch protection is at least embraced within the "required inimum" secured by the "due process" clause. *Truax v. orrigan*, 257 U. S. 312, 331, 332, 66 L. ed. 254, 262, 63 (1921) (note 16, page 34).

The court is not here called upon to substitute its udgment for that of the legislative body responsible for his Private Act. No question of "reasonable" or any ther classification is presented for consideration. Private ct No. 445, singling out one individual for its benefits nd these appellants for its burdens, exhausts itself upon he parties to this litigation alone. Being plainly arbitrary nd discriminatory upon its face, this Private Act, even hen tested by the "minimum requirements" of "due rocess," must be condemned.

Thus the suggested distinction, if any, between "due rocess" and "equal protection," as intimated in *Truax Corrigan*, supra, becomes irrelevant to this inquiry.

The decisions of this and other courts, examined above, ompel condemnation of this Private Act as violative of ie most fundamental concept of "due process" however eneficent the purpose of this Private Act or the in-

tentions of its proponents.[17]

Equality of application of the law is synonomous with "due process,"—unreasonable and discriminatory classification is its antithesis. Neither in terms nor by implication does Private Act No. 445 attempt classification, reasonable or otherwise. It is plainly arbitrary and discriminatory and must be declared repugnant to the constitutional guaranty of "due process of law" embodied in the Fifth Amendment.

POINT B:

PRIVATE ACT NO. 445 OF THE 74TH CONGRESS DEPRIVES APPELLANTS OF THEIR PROPERTY WITHOUT DUE PROCESS OF LAW BY DESTROYING PROPERTY RIGHTS VESTED UNDER A PRIOR FINAL COMPENSATION ORDER MADE PURSUANT TO THE PROVISIONS OF THE LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT.

Diligent research has failed to reveal any instance in which Congress has by Private Act determined private rights between two individuals singled out for such treatment. With unbroken uniformity the private acts of Congress have been appropriations in the form of pensions or private grants of relief enacted under the authority of the spending power of Congress, the limitations on which power this court has not yet been called upon to define. And it would appear under the doctrine of *Massachusetts v. Mellon*, 262 U. S. 447, 67 L. ed. 1078 (1923), that even though this power were limited by the

[17]See Report of Senate Committee on Claims (App. 13).

equivalent of an "equal protection clause" these private appropriations could not be subjected to judicial review.

Our research has revealed but two cases in which an attempt by Congress to determine property rights of private individuals has been considered. In *Jones v. Meehan*, 175 U. S. 1, 44 L. ed. 49 (1899), Congress by joint resolution had authorized the Secretary of the Interior to approve a lease made by the successor in interest of the grantee of certain Indian lands to the defendant as against a prior lease which had been made to the plaintiff. In holding ineffective this attempt of Congress to alter the property rights among the parties this Court stated:

> "The title of the strip of land in controversy, having been granted by the United States to the elder chief * * * and have descended * * * to his eldest son and successor * * *, passed to the lease executed by the latter in 1891 to the plaintiffs for the term of that lease; and their rights under that lease could not be devested by any subsequent action of the lessor, or by Congress, or of the executive departments." (p. 32).

In the second of these cases, *Pocono Pines Hotels Co. v. U. S.*, 73 C. Cls. 447 (1932), a situation closely approximating the problem presented by the case at bar was considered. The precise question litigated involved the validity of a Congressional act remanding the case to the Court of Claims for a further investigation of the facts. This act was construed merely to authorize an advisory legislative investigation by the Court which in no wise disturbed the judgment which had been theretofore awarded the plaintiff. However, in a well-reasoned opinion, the court considered at length a proposed

measure which Congress had rejected in favor of the statute in question. Concerning this proposed measure which would have ordered a new trial in the cause, the court declared that such a statute would unconstitutionally deprive the plaintiff of vested property rights, stating:

"The language employed in the rejected amendment is precise and free from ambiguity; its purpose and intent may not be misconstrued. The challenge as to its validity went uncontradicted, in so far as it was predicated upon the exercise of judicial power by Congress. Contentions as to its validity were predicated upon this court's jurisdiction and the finality of its judgments. *It nowhere appears that any suggestion was advanced in the enactment of such legislation with reference to a court other than this one it would be aught else than the exercise by Congress of judicial and not legislative power.* The court is of unanimous opinion that if this were the sole issue in this case, the plaintiff's motion to vacate the order of reference heretofore made would have to be allowed. In keeping with established precedents and in accord with what the law establishes, there is but one tribunal of the United States which may direct this court to grant a new trial in a case adjudicated by this court under section 145 of the judicial code, and that tribunal is the Supreme Court of the United States" (pp. 498-499).

"Of course, Congress may by special act waive any defense it may have, either legal or equitable, to a suit in this court. By so doing, no rights of the person asserting the claim are prejudiced and no property rights invaded. On the contrary, they are enlarged. *A pronounced and vitally different situation exists where the plaintiff has procured a valid judgment against the United States and it is sought to subject its permanency to the hazard of a new trial. A judgment if lawful is property and so recognized by law.*

> Congress has frequently waived by special act defenses which were avilable to the United States in the prosecution of claims in this court. Suits of Indian tribes invariably involve the statute of limitations and legal and equitable rights. Numerous cases, quite too many to cite, may be found in the reports of the court where Congress impressed with the equitable justice of the plaintiff's demand, and convinced that save for technical defenses the plaintiff would have recovered judgment, has waived the same by special act and the cases have been adjudicated by this court under such acts. *Such proceedings and the jurisdiction of the court with respect thereto bear no analogy whatever to the situation involved in the present controversy*'" (pp. 495-496).

1. The compensation order and award of August 26, 1931 is a final adjudication conferring upon appellants vested property rights.

It is universally recognized that a valid, final judgment confers vested property rights which cannot be altered by subsequent legislation. *United States v. Peters*, 5 Cranch 115, 136 (U. S. 1809); *McCullough v. Virginia*, 172 U. S. 102, 125, 43 L. ed. 382, 390 (1898); *Memphis v. United States*, 97 U. S. 293, 297, 24 L. ed. 920, 923 (1878); *Hoyt Metal Co. v. Atwood*, 289 Fed. 453, 454, 455 (C. C. A. 7, 1923); *Gilman v. Tucker*, 28 N. E. 1040 (N. Y. 1891).

As stated by Chief Justice Marshall in *United States v. Peters*, supra:

> "If the legislatures of the several states may, at will, annul the judgments of the courts of the United States, and destroy the rights acquired under those judgments, the constitution itself becomes a solemn mockery. * * *."

Thus, judgments awarding continuing payments are property, and it is not competent for the legislature to

take away such vested right by providing in subsequent legislation for a modification of such decrees, which were final and unalterable as of the date of their rendition. *Blethen v. Blethen*, 32 Pac. (2d) 543 (Wash. 1934); *Livingston v. Livingston*, 66 N. E. 123 (N. Y. 1903). So also is the same protection afforded property rights vested by virtue of an administrative determination. *Noble v. Union River Logging Co.*, 147 U. S. 165, 37 L. ed. 123 (1893).

Likewise, the same protections are afforded to a defendant under a final judgment as to a plaintiff. *Springstun v. Springstun*, 229 Pac. 14 (Wash. 1924). Thus in *Germania Savings Bank v. Suspension Bridge*, 54 N. E. 33 (N. Y. 1899), it was held that a judgment of dismissal vested such rights in the defendant that the legislature could not authorize an appeal after the time for appeal under existing law had elapsed, the court stating:

> " * * * The legislature has control of remedies so far as they affect existing actions. This control includes the power to extend the time to appeal, or to grant a new right of appeal, provided some time yet remained, according to the law in force when the legislature acted, within which an appeal might have been taken. *If, however, according to the law existing when the statute extending the time to appeal, or granting a new right of appeal, was passed, the judgment had become final and unalterable, because no further right of appeal existed, then the judgment conferred a vested right, and was property, of which the owner could not be deprived by an act of the legislature, or otherwise than through due process of law.* An appeal brought pursuant to a statute which authorizes an appeal after the time provided by law had expired, or authorizes a further appeal after the only appeal authorized by law had been brought and

finally decided, although it might result in the reversal of the judgment, and be in form a judicial proceeding, would not be what is known as 'due process of law,' which is not satisfied by a judgment based upon an unconstitutional statute. * * *."

A compensation order under the Longshoremen's and Harbor Workers' Compensation Act is a final determination of "private right, that is, of the liability of one individual to another under the law as defined." *Crowell v. Benson*, 285 U. S. 22, 51, 76 L. ed. 598, 613 (1932). And an award issued pursuant to said Act[18] embodies the statutory liability imposed by the Act[19] and the duty to pay such an award[20] is an obligation enforceable in a court of law[21]. A more clearcut determination of vested property rights is difficult to conceive. Judge Van Syckel in his dissenting opinion to *Moore v. State*, 43 N. J. L. 203, 243 (1881), has defined vested rights in the following manner:

> "In the widest sense they are rights which are complete and consummated, so that nothing remains to be done to fix the right of the citizen to enjoy them."

It would seem to be beyond question that the relationships fixed by a final compensation order constitute vested rights. The rights of these appellants were well characterized by Justice Story writing in *Trustees of Darthmouth College v. Woodward*, 4 Wh. 518, 699 (U. S. 1819), who stated:

"The truth, however, is, that all incorporeal

[18]Title 33 U. S. C. A., §919.
[19]Title 33 U. S. C. A., §904.
[20]Title 33 U. S. C. A., §914.
[21]Title 33 U. S. C. A., §918.

hereditaments, whether they be *immunities*, dignities, offices, or franchises, or other rights are deemed valuable in law. The owners have a legal estate and property in them. * * *."

Subject only to the statutory provisions for review and modification[22] an award is a final determination of all questions involved in the litigation and the rights and liabilities affixed therein are immune from further alteration. *Shugard v. Hoage*, 89 F. (2d) 796 (C. A. D. C. 1937); *Mille v. McManigal*, 69 F. (2d) 644 (C. C. A. 2, 1934); *Associated Indemnity Corp. v. Marshall*, 71 F. (2d) 235 (C. C. A. 9, 1934); *Campbell v. Lowe*, 10 F. Supp. 288 (D. C. N. Y., 1935); *Didier v. Crescent Wharf & Warehouse Co.*, 15 F. Supp. 91 (D. C. Cal. 1936); *Globe Stevedoring Co. v. Peters*, 57 F. (2d) 256 (D. C. Tex. 1931); *Bulczak v. Independent Pier Co.*, 17 F. Supp. 973 (D. C. Pa. 1937); *United Fruit Co. v. Pillsbury*, 55 F. (2d) 369 (D. C. Cal., 1932). See also *Twine v. Locke*, 68 F. (2d) 712 (C. C. A. 2, 1934).

As has been stated in *United Fruit Co. et al, v. Pillsbury*, 55 F. (2d) 369, 370, 371 (D. C. Cal., 1932):

> " * * * the act says that a compensation order becomes 'final at the expiration of the thirtieth day' where the compensation order has not been suspended or set aside by injunction. The text of the act shows a congressional intent to have final awards and termination of litigation. To give a different interpretation would require judicial legislation by decision. If a different interpretation were to be followed, a deputy commissioner could reserve jurisdiction by inserting this same provision in each and every case and there would be no known termination of litigation. This is obviously not the intent of

[22] 33 U. S. C. A., §§21, 22, quoted supra note 5, p. 8.

the law as written. The deputy commissioner was therefore without power or jurisdiction to reopen the proceeding after it had become final or to hold a hearing on August 20, 1931, or to issue another and new and different order and award on August 31, 1931."

The United States Employees' Compensation Commission in a letter to the House Committee on Claims, commended the rejection of Private Act No. 445 and aracterized the rights of these appellants in the follow- g language:

"The deputy commissioner in the administration of the Longshoremen's Act performs quasi-judicial functions in determining the respective rights of the parties under the act. The adjudication of claims under the act vests a species of property rights in the interested parties which the Commission believes cannot be disturbed after they have become final and no longer subject to review as provided by the act."[23]

2. The review authorized by Private Act No. 445 estroys the rights and obligations which were nally determined by the order and award of ugust 26, 1931.

The courts have been uniform in declaring that the gislature is powerless to subject litigants to a further ppeal, review or new trial where the time for such rocedure has elapsed under applicable existing statutes, sing their decisions on the ground that such action

[23]Appendix, p. 25.

would destroy property rights vested by the prior final adjudication.[24]

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[24] *In the following cases it has been held that:*

(a) *The legislature cannot authorize an appeal or bill of review where the time for such review has lapsed:* Atkinson v. Dunlap, 50 Me. 111 (1862); Bates v. Kimball, 2 D. Chip. 77 (Vt. 1824); Beaupre v. Hoerr, 13 Minn. 366 (Gil. 339-1868); Durham v. Lewiston, 4 Me. 140 (1826); Germania Savings Bank v. Suspension Bridge, 54 N. E. 33 (N. Y. 1899); Gomph v. Wolfinger, 65 N. E. 878 (Ohio 1902); Hill v. Town of Sunderland, 3 Vt. 507 (1831); Lancaster v. Barr, 25 Wis. 560 (1870); Lewis v. Webb, 3 Me. 326 (1825); Story v. Runkle, 32 Tex. 398 (1869); Trim v. McPherson, 7 Coldw. 15 (Tenn. 1869); Wieland v. Shillock, 24 Minn. 345 (1877); Willoughby v. George, 5 Colo. 80 (1879); Woodman v. Fulton, 47 Miss. 682 (1783). See also: Ely v. Holton, 15 N. Y. 595 (1857); McAbe v. Emerson, 18 Pa. 111 (1851); People v. Carnal, 6 N. Y. 463 (1852); Pocono Pines Hotels Co. v. United States, 73 C. Cls. 447 (1932).

(b) *The legislature cannot order a new trial or a rehearing of a cause where the time for such procdeure has elapsed under existing statutes:*

Davis v. Menasha, 21 Wis. 491 (1867); DeChastellux v. Fairchild, 15 Pa. St. 18 (1850); Dorsey v. Dorsey, 37 Md. 64 (1872); Petition of Siblerud, 182 N. W. 168 (Minn. 1921); In re Greene, 60 N. E. 183 (N. Y. 1901); In re Hendley's Estate, 49 Pac. 829 (Utah 1897); Marpole v. Cather's Administrator, 78 Va. 239 (1883); Merrill v. Sherburne, 1 N. H. 199 (1818); Burch v. Newbury, 10 N. Y. 374 (1852); Peerce v. Kitzmiller, 19 W. Va. 564 (1882); Ratcliffe v. Anderson, 31 Gratt. 105 (Va. 1878); Sanders v. Cabaniff, 43 Ala. 173 (1869); State ex rel. Flint v. Flint, 63 N. W. 1113 (Minn. 1895); Taylor & Co. v. Place, 4 R. I. 324 (1856); Trustees Fund v. Bailey, 10 Fla. 238 (1864); See also: People v. Frisbie, 26 Cal. 135 (1864).

(c) The following miscellaneous cases have also held that the rights and obligations determined by a final adjudication are immune from further legislative alteration.

Tate's Executors v. Bell, 4 Yerger 202 (Tenn. 1833), (Special act authorizing plaintiff to "revive" judgment in their name, held unconstitutional);

Hunter v. United States, 10 F. Supp. 1014 (D. C. Mo. 1935), ("Reinstatement" of a claim after judgment of dismissal held unconstitutional);

In re Opinion of The Justices, 127 N. E. 635 (Mass. 1920), (Act "Superseding" a judgment declared unconstitutional);

Denny v. Mattoon, 2 Allen 361 (Mass. 1861), (Legislative attempt to "annul" a judgment held unconstitutional).

Legislative attempts to reopen final awards under State Workmen's Compensation statutes where the time for such procedure has elapsed have also uniformly been held ineffective. These cases presenting a situation identical with the case at bar will be discussed, infra, pages 61-65.

It may also be suggested that Private Act No. 445 deprives appellants of property without due process of law by destroying contractual obligations in that the then existing statutory provisions of the Longshoremen's and Harbor Workers' Compensation Act entered into and formed a part of the contractual relation of employment between appellants and appellee. Compare *Warner v. Zaiser*, 239 N. W. 761 (Minn. 1931); *Preveslin v. Derby etc. Co.*, 151 Atl. 518 (Conn. 1930); *Reynolds v. E. Clemens Horst Co.*, 170 Pac. 1082 (Cal. 1918). While it is recognized that there is no specific constitutional prohibition against Congressional impairment of the obligations of contract, this Court has nevertheless held that Congress cannot destroy property rights which have been established by contractual obligations. *Louisville Joint Stock Land Bank v. Radford*, 295 U. S. 555, 79 L. ed. 1593 (1935).

An analogous situation illustrating the immunity from legislative modification of rights and obligations determined by a final adjudication is to be found where redemption rights in mortgage foreclosures have become final under the existing state legislation. It has been

held[25] that Congress cannot validly extend the redemption period for mortgages where (a) the period of redemption has expired prior to enactment of the Congressional Act, *In re Lowmon*, 79 F. (2d) 887 (C. C. A. 7-1935); *In re Young*, 12 F. Supp. 30 (D. C. Ill. 1935); compare: *In re Sherman*, 12 F. Supp. 297 (D. C. Va. 1935); or (b) where foreclosure has been prosecuted to sale, *In re Weise*, 12 F. Supp. 871 (D. C. N. Y. 1935); nor (c) can a state validly extend the period of redemption when all rights have been finally determined under existing law. *Barnitz v. Beverly*, 163 U. S. 118, 41 L. ed. 93 (1896); *Phoenix Joint Stock Land Bank v. Dewey*, 8 F. Supp. 678 (D. C. Kan. 1934); compare: *Home Building & Loan Assn. v. Blaisdell*, 290 U. S. 398, 78 L. ed. 413 (1934).

3. Private Act No. 445 deprives appellants of substantive rights and is not merely procedural.

With no evident attempt to analyze Private Act No. 445, nor to test it effects by any recognized criteria of constitutionality the majority of the court below was content to rest its decision upon the case of *Williams v. Norris*, 12 Wh. 117 (U. S. 1827), which case apparently rendered "this three-judge district court unable to rule without doubt that the Private Act of Congress for the relief of John T. Clark here assailed is unconstitutional."[26]

In *Williams v. Norris*, 12 Wh. 117 (U. S. 1827) one Norris had made entry to certain lands in North Carolina.

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[25]The Frazier-Lempke Act (48 Stat. 1289, 11 U. S. C. A. §203) was held unconstitutional on other grounds. Louisville Joint Stock Land Bank v. Radford, 295 U. S. 555, 79 L. ed. 1593 (1935). Compare: Wright v. Mountain Trust Bank, 300 U. S. 440, 81 L. ed. 736 (1937).

[26]Appendix, p. 4.

under whose law such entries were capable of being perfected and carried into grant as the legislature might direct. Certain transfers of the land and the power to perfect such entries thereafter occurred which vested in Tennessee the power to perfect these entries. General legislation prescribed procedure to be followed for perfecting such land entries into grant. Following Norris' entry a patent was issued by Tennessee to one Williams covering the lands in question. Thereafter a private act was passed by Tennessee providing for the procedure whereby Norris might perfect his prior entry into grant. Contesting the right of Norris to the lands in question, Williams contended that the private act was a law impairing the obligation of contract, i. e., Williams' patent. The court stated regarding the private act in question (pp. 126-129):

> "In determining * * * its effect, it is necessary to inquire whether Norris' entry was absolutely void, or gave an incipient title, capable of being carried into grant. * * *.
>
> " * * * .
>
> "Entries * * * though not accompanied by the purchase-money were not absolutely void but would become valid should the purchase-money be afterwards paid; * * * proof of payment might be received as the legislature should prescribe. * * *.
>
> "Had the claim of Norris been decided * * * under general law, it would probably never have been contested. What difference is there, so far as respects its constitutionality between the act passed in his particular case, and the act containing a general reference of all cases of the same description to the Commissioner? The difference consists solely in this: the general act admits no other proof of pay-

ment than a certificate from the Comptroller of North Carolina; the particular act authorizes the commissioner to establish the claim on sufficient evidence. * * *. We know of no principle which could impose on the legislature of the State the necessity of exacting from the claimant * * * as indispensable to the establishment of his claim, a certificate from the comptroller of North Carolina, that the purchase-money had been paid. * * * If, then, the general act of Tenessee had allowed the commissioner to issue warrants on sufficient proof, such act might have been questioned on the ground of policy, but not of right.

"If this be correct, if the legislature might have dispensed with this testimony in a general law, why might it not be dispensed with in a particular law, where its effect on the cause is precisely the same as if it had been general? * * *.

"The act 'for the relief of Ezekiel Norris,' did not authorize the commissioner to grant him a certificate or warrant on his entry, unless he should prove that the purchase-money had been paid. The laws had preserved such entries, and, consequently, an act to enable the proprietor of one of them to prosecute his claim, is not necessarily an act impairing the obligation of a contract.

" * * *.

"We are of opinion that this record does not exhibit a case of which this court can take jurisdiction, and that the writ of error ought, therefore, to be dismissed."

It is submitted that this case of *Williams v. Norris* is no authority for the constitutionality of Private Act No. 445.

The Private Act there in question was remedial only and merely provided the procedure whereby one Norris was to prove the payment of the purchase-money of a land

entry which he was seeking to perfect. The particular procedure afforded Norris, worked no hardship on other claimants whose rights were secured under the general law. Nor were vested property rights as between private individuals destroyed, the act being solely concerned with the perfection of title to state public lands, the plenary power of disposition of which was vested in the state legislature. That portion of the opinion relied on by the Court below is irrelevant to the case at bar since the question there being considered was whether the act impaired the obligation of contract. Furthermore, the state statute there involved was passed and considered prior to the enactment of the Fourteenth Amendment at a time when there was no federal constitutional prohibition against discriminatory state legislation. Finally, that portion of the opinion relied on is entirely *obiter dictum*, as the Court dismissed the writ of error and failed to take jurisdiction.

Private Act No. 445 is not merely remedial and does not purport to modify the procedure whereby an existing cause of action may be enforced. A situation to be distinguished is involved in the case of *Campbell v. Holt*, 115 U. S. 620, 29 L. ed. 483 (1885), much relied on by appellees. It was there held that a state statute reviving a contract cause of action barred by a statute of limitations does not violate the Fourteenth Amendment since the statute barred only the remedy and the duty to pay still existed. It is submitted that that case is entirely inapplicable to the case at bar for the following reasons:

(a) The statute there involved was one of general application to all persons similarly situated. Compare

Holden v. James, 11 Mass. 396 (1814) wherein the Massachusetts court held unconstitutional a statute purporting to revive the claim of a single individual barred by a limitation statute, stating:

> "It is manifestly contrary to the first principles of civil liberty and natural justice, and to the spirit of our constitution, and laws, that any one citizen should enjoy privileges and advantages which are denied to all others under like circumstances; or that any one should be subject to losses, damages, suits, or actions from which all others under like circumstances are exempted."(p.405)

See also *Bagg's Appeal*, 43 Pa. St. 512 (1862).

(b) Assuming that the statutory right to file a claim for the reopening of an award and for additional compensation is in the nature of a continuing cause of action (compare *Mattson v. Department of Labor and Industries*, 293 U. S. 151, 79 L. ed. 251 (1934)), the time limitation is inseparably tied up with the right given by the statute. *Young v. Hoage*, 90 F. (2d) 395 (C. A. D. C. 1937); *Ayers v. Parker*, 15 F. Supp. 447 (D. C. Md. 1936); *Kobilkin v. Pillsbury*, 103 F. (2d) 667 (C. C. A. 9, 1939).

In the case of such statutory causes of action it has been uniformly held that the lapse of the time limit not only bars the remedy but destroys the liability as well and any attempt of the legislature retroactively to revive such causes of action constitutes a deprivation of property without due process of law. *Danzer & Co. v. Gulf & Ship Island R. Co.*, 268 U. S. 633, 69 L. ed. 1126 (1925); *Peninsula Produce Exchange v. New York P. & N. R. Co.*, 137 Atl. 350 (Md. 1927), affirmed 276 U. S. 599, 72 L. ed. 724 (1928). See also *New York Central*

R. Co. v. Lazarus, 278 Fed. 900, 904 (C. C. A. 2, 1922); *Wenatchee Produce Co. v. Great Northern Ry. Co.*, 271 Fed. 784, 785 (D. C. Wn. 1921). In the *Danzer* case, which well points out the limited application of *Campbell v. Holt*, an action was brought to recover damages awarded by the Interstate Commerce Commission in a reparation hearing. The right to file the claim with the Interstate Commerce Commission had expired prior to the enactment of Sec. 206 (f) of the Transportation Act which purported to eliminate the period of Federal control from computation of time, thus making the filing of the claim timely. In upholding dismissal of the action, the court said:

> "* * * the lapse of time not only barred the remedy, but also destroyed the liability of defendant to plaintiff * * *.
>
> "* * *.
>
> "* * * Section 206 (f) will not be construed retroactively to create liability. To give it that effect would be to deprive defendant of its property without due process of law, in contravention of the 5th Amedment."

(c) Finally, the rationale of *Campbell v. Holt* is entirely inapplicable to a situation as in the case at bar where a final adjudication of the claim in question has taken place. The law has wisely recognized the necessity of finality in litigation whereby the rights and obligations between individuals as they relate to particular transactions are determined once and for all time.

Accordingly, it is well established that recovery of a judgment extinguishes the original cause of action which is viewed as swallowed up in or merged in the judgment

so as to preclude suit on the original action. *Gaines v. Miller*, 111 U. S. 395, 28 L. ed. 466 (1884). See also *United States v. Price*, 9 How. 83, 93-94, 13 L. ed. 56, 60 (U. S. 1894); *United States v. Ames*, 99 U. S. 35, 44-45, 25 L. ed. 295, 300 (1878); *Sessions v. Johnson*, 95 U. S. 347, 347-348, 24 L. ed. 596 (1877).

As stated by Justice Brandeis in *Hamer v. New York Railways Co.*, 244 U. S. 266, 272, 61 L. ed. 1125, 1129 (1917):

> "The rights on the original guaranty * * * were merged in the judgment. * * * For the recovery of the judgment extinguished through merger the original cause or causes of action. * * *."

It is said in *United States v. Leffler*, 11 Pet. 86, 100-101, 9 L. ed. 642, 647 (U. S. 1837):

> "If there by any one principle of law settled beyond all question, it is this, that whensoever a cause of action in the language of the law, *transit in rem judicatum*, and the judgment thereupon remains in full force unreversed, the original cause of action is merged and gone forever."

Nor is it material for the purpose of merger that an appeal is being prosecuted. *Moore v. Williams*, 24 N. E. 619 (Ill. 1890).

The compensation order and award of August 26, 1931 was, therefore, a final adjudication of the rights and liabilities arising out of the injuries suffered by appellee Clark which served to extinguish the cause of action as such. The statutory period for review (30 days) having admittedly expired, this compensation order and award was protected against review, appeal, reopening or rehearing (see pp. 44-45, supra) and the order of March

13, 1939 (R. 17) (App. 10), made under the purported authority of Private Act No. 445, attempted to determine liability on a cause of action which no longer existed, thereby depriving appellants of their property without due process of law.

4. Private Act No. 445 attempts to create a new substantive right for the benefit of appellee John T. Clark and is not merely an amendment to the Longshoremen's and Harbor Workers' Compensation Act.

Private Act No. 445 by its very terms does not purport to amend the Longshoremen's and Harbor Workers' Compensation Act. All other rights and liabilities vested under that Act in the past and all those to accrue in the future remain unaffected by Private Act No. 445 whose sole force and effect is directed toward and exhausted upon the legal relationships of the parties to this litigation. The cause of action created by the Longshoremen's and Harbor Workers' Compensation Act in favor of appellee John T. Clark has been finally adjudicated and can no longer be the basis of further obligations on the part of appellants. (See pp. 54-55, supra). Private Act No. 445 in effect attempts to create a new cause of action in favor of appellee John T. Clark and thereby deprives appellants of their property without due process of law. To past transactions it retroactively attempts to attach obligations new and different from the liabilities which arose under then existing law.

It is recognized that the *mere* retrospective operation of a statute in and of itself affords no basis for invalidat-

ing the enacement.[27] The retroactive operation of this statute which must be condemned is its attempt to foist upon prior transactions new liabilities and new obligations. It has been repeatedly held that such retroactive legislation is invalid as a deprivation of property rights without due process of law. *Webster v. Cooper*, 14 How. 488, 14 L. ed. 510 (U. S. 1853); *Barnitz v. Beverly*, 163 U. S. 118, 41 L. ed. 93 (1896); *Bradley v. Lightcap*, 195 U. S. 1, 49 L. ed. 65 (1904); *Ettor v. Tacoma*, 228 U. S. 148, 57 L. ed. 773 (1913); *Ochoa v. Hernandez Y Morales*, 230 U. S. 139, 57 L. ed. 1427 (1913). See also *Dash v. Van Kleek*, 7 Johns. 477 (N. Y. 1811, Kent, C. J. at 500). Nor can property rights vested under existing statutes be destroyed by a subsequent repeal thereof. *U. S. v. Kendall*, 263 Fed. 126 (D. C. La., 1920); *Arnold & Murdock Co. v. Industrial Comm.*, 145 N. E. 342 (Ill. 1924); *Dow v. Norris*, 4 N. H. 16 (1827).

A further infirmity to be found in Private Act No. 445 is that it arbitrarily takes property from one private individual and gives it to another. *Missouri Pacific R. Co. v. Nebraska*, 164 U. S. 403, 41 L. ed. 489 (1896); *Railroad Retirement Board v. Alton R. Co.*, 295 U. S. 330, 79 L. ed. 1468 (1935). As is well stated in *Hudson Duncan & Co. v. Wallace*, 21 F. Supp. 295, 308 (D. C. Ore. 1937):

"The Fifth Amendment, by implication forbids

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[27] See the excellent analyses and discussion of this subject in Smith, "Retroactive Laws and Vested Rights" (1938), 2 Selected Essays on Constitutional Law 266; (1927), 5 Tex. L. Rev. 231; (1928), 6 id. 409; and Smead "The Rule Against Retroactive Legislation; a Basic Principle of Jurisprudence" (1936), 20 Minn. L. Rev. 775. See also Stimson, "Retroactive Application of Law—A Problem in Constitutional Law" (1939), 38 Mich. L. Rev. 30.

the taking even under the authority of Congress of the private property of one person and the giving of it to another."

5. Private Act No. 445 is an attempted usurpation by Congress of judicial functions.

Private Act No. 445 deprives appellants of property without due process of law in that it is judicial in nature and authorizes a readjudication of private property rights between individuals arising out of past transactions.

While it is recognized that the complexities of modern governmental problems have necessitated the rejection of many contentions that the activities of administrative boards have violated the principle of separation of powers, it nevertheless remains written that "the judicial power of the United States shall be vested in one Supreme Court, and in such other inferior Courts as the Congress may from time to time ordain and establish," *U. S. Constitution*, Art. 3, §1, "and this separation and the consequent exclusive character of the powers conferred upon each of the three departments is basic and vital—not merely a matter of governmental mechanism." *Springer v. Philippine Islands*, 277 U. S. 189, 201, 72 L. ed. 845, 849 (1928).

It has been repeatedly held that Congress possesses no judicial power, *Kilbourn v. Thompson*, 103 U. S. 168, 26 L. ed. 377 (1880), the nature of which power this court has well declared in the following language:

> "* * * A judicial inquiry investigates, declares, and enforces liabilities as they stand on present or past facts and under laws supposed already to exist. That is its purpose and end. Legislation, on the other hand, looks to the future and changes

existing conditions by making a new rule, to be applied thereafter to all or some part of those subject to its power.*** ." *Prentis v. Atlantic Coast Line Co.*, 211 U. S. 210, 226, 53 L. ed. 150, 158 (1908).

The courts with unanimity have held that any attempt by the legislature to grant a new trial, rehearing or further determination in a cause which has proceeded to final adjudication under existing statutes is invalid as an attempted exercise of judicial power.[28]

In the leading early American case of *Merrill v. Sherburne*, 1 N. H. 199 (1818) it was held that the legislative grant of a new trial was thus invalid, the court stating:

> " * * * a marked difference exists between the employments of judicial and legislative tribunals. The former decide upon the legality of claims and conduct; the latter make rules upon which, in connection with the constitution, those decisions should be founded. * * * In fine, the law is applied by the one, and made by the other. To do the first, therefore, to compare the claims of parties with the laws of the land before established, is, in its nature, a judicial act. But to do the last, to pass new rules for the regulation of new controversies, is in its nature a legislative act; and if those rules interfere with the past or the present, and do not look wholly to the future, they violate the definition of a law, 'as a rule of civil conduct.' 1 Bl. Com. 44. Because no rule of conduct can, with consistency, operate upon what occurred before the rule itself was promulgated.
>
> " * * * As the legislature, then, in the act under consideration, adjudicated on a case which had already happened, and had been litigated between individuals, their proceedings must, on general principles, be deemed an exercise of judicial powers. * * *."

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[28]See note 24, supra, p. 46.

Similarly, in *Petition of Siblerud*, 182 N. W. 168, 169 (Minn. 1921), it has been recently held that an attempted authorization of a rehearing in a local improvement proceeding was ineffective, the court stating:

> " * * * Now, it is proposed to vacate the findings and conclusion, revive the proceeding after it has been conducted to a final determination, and bring it on for hearing de novo. This court has held that the Legislature has no power to grant a new trial or rehearing of a cause after it has been heard and determined on the merits. * * * But, when the states adopted their Constitutions, they separated the judicial from the legislative power and divided the government into three distinct departments, the legislative, the executive, and the judicial, and generally declared that no one of the departments should exercise any of the powers properly belonging to either of the others. Such is the constitutional provision in this state. Article 3, State Constitution. In states where the Legislature had theretofore exercised the power to grant new trials, the adoption of a constitution containing such a provision was uniformly held to put an end to the power. It is generally agreed that to vacate a judgment or order which a court had authority to enter involves the exercise of judicial power, and that legislative action cannot be made to retroact upon past controversies by compelling the courts to set aside their judgments or to grant new trials. * * *."

An analogous situation to the case at bar is considered n *Union School District No. 1 v. Foster Lumber Co.*, 286 Pac. 774, 775 (Okla. 1930), wherein the legislature had sought by a special act to authorize and direct the endition of a judgment in that particular case in favor of the plaintiff. This act was held to be unconstitutional, he court stating:

> "The special act offends that part of the Constitution (section 1 of article 4) which divides our government into three departments, legislative, executive and judicial. This legislative act seeks to invade judicial power, in that it attempts to adjudicate a particular case by prescribing a rule contrary to the general law. That cannot be done. * * *."

Similarly it has been recently recognized that the enactment by Congress of any such legislation would be invalid as an exercise of judicial power. In *Pocono Pines Hotels Co. v. United States*, 73 C. Cls. 447, 499 (1932) it is stated:[29]

> "It nowhere appears that any suggestion was advanced that in the enactment of such legislation with reference to a court other than this one it would be ought else than the exercise by Congress of judicial and not legislative power."

See also: *Casieri's case*, 190 N. E. 118 (Mass. 1934); *Roles Shingle Co. v. Bergerson*, 19 Pac. (2d) 94 (Ore. 1933).

In summary it is submitted that Private Act No. 445 is unconstitutional and deprives appellants of their property without due process of law in that it destroys the rights and obligations which had become fixed and final under a prior compensation order. Furthermore, this Private Act affects the substantive right of these appellants and is not merely remedial in its nature. Its effect is to affix liabilities for a cause of action which no longer exists between the parties or to foist upon past transactions new and different obligations from those which arose under existing law and as such is an invalid exercise by the Congress of judicial power.

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[29]See discussion of this case, supra, at pp. 39-41

POINT C:

ILLUSTRATIVE DECISIONS CONSTRUING SIMILAR STATE ACTS.

While Private Act No. 445 is the first attempt by Congress to enact legislation of this nature, various state legislatures have heretofore passed similar acts to accomplish a like purpose. It is gratifying to note that with complete uniformity the state courts have held such acts unconstitutional and void.

In *Riggs v. Lehigh Portland Cement Co.*, 131 N. E. 231, 232 (Ind. 1921), by subsequent amendment of the Workmen's Compensation Law, rights to compensation were provided, not existing at the time of death of an employee. In affirming the refusal of the Industrial Board to make a further award based on the amendment, the court said:

> "We are of the opinion that the rights of all concerned were fixed by the act under which the award was made, and may not be modified by subsequent legislation. * * *. To permit subsequent legislation to increase or diminish the compensation specified in awards would be to strike down vested rights. Then no one would be secure. The resulting uncertainty, distrust, and confusion would destroy the compensation plan itself. To give to the amendment the effect desired * * * would be to confer * * * a substantive right which she did not possess at the time of the injury and death of her father, and to impose on the employer a burden not imposed by the law at that time. * * *."

In *Casieri's case*, 190 N. E. 118, 120 (Mass. 1934), involving the Workmen's Compensation Act of Massachusetts, a final order was entered by the reviewing board on November 10, 1928, terminating compensation

for disability as of December, 1927, on the ground that disability had ceased; thereafter, and pursuant to an amendment of the act adopted in 1932, removing the finality of such order, on petition of the employee further compensation was ordered which was affirmed by the superior court. On appeal of the insurer, the order for further compensation was reversed, the court stating:

> "Broad as is the power of the Legislature, it cannot reopen a decision once made as final according to existing law by a judicial tribunal or a quasi judicial board in the exercise of judicial functions so far as it affects private rights of property. Although the Industrial Accident Board is an administrative tribunal and not a court, its decisions partake of the nature of a court's decisions in their effect upon private property rights. * * * The decision of the board that all disability was at an end in December of 1927, was a final decision amounting to a judgment in favor of the insurer. * * * Such a judgment is property. * * *. It cannot, constitutionally, be taken away without compensation. * * * St. 1929, c. 246, by its terms as amended by St. 1932, c. 117, takes away that property. Moreover, inasmuch as a decree of a court might have issued on the board's decision, we think the principle applicable that a Legislature cannot grant a review or rehearing of the judgment or decree of a court where none is provided at the time of the decision.
>
> "In speaking of a statute which declared to be superseded a decree of this court confirming a report in a grade crossing proceeding, the justices said: 'The final decree * * * was a judgment of the court. The legislature cannot exercise judicial powers. * * * Any legislative attempt to that end would be a nullity. Manifestly it is the exercise of judicial power to grant a new trial or a rehearing in a cause in the courts, or to declare ineffective, or to reverse, annul, change, modify or affect the judgment of a court.' * * *.

"* * * The statutes questioned pass beyond the line of legislation with regard to procedure, and, so far as retroactive, must be held to be inoperative. * * *.

"* * * the decree must be reversed. It is in violation of the Fourteenth Amendment to the Constitution of the United States * * *."

In *Decker v. Powailsmith Corporation*, 168 N. E. 442, 443 (N. Y. 1929), the court, in referring to a similar private act for the relief of an employee whose claim was barred under the Workmen's Compensation Law, speaking through Judge Pound, Cardozo, C. J. concurring, stated:

"Chapter 709, Laws of 1927, is a special or private act for the relief of claimant, intended to revive his claim. It denies to the employer the equal protection of the laws by singling out one of a class for special burdens and obligations. One person should not be subjected to liability from which all others in like circumstances are exempted."

In *Roles Shingle Co. v. Bergerson*, 19 Pac. (2d) 94, 95, 96 (Ore. 1933), a sister of a deceased employee filed claim for compensation with the State Industrial Accident Commission, which claim was denied; on appeal the circuit court reversed, and on further appeal the decision of the circuit court was reversed, as the appeal to that court had not been taken within the time provided by law. Thereafter the legislature passed an act providing as follows:

"That the state industrial accident commission of the State of Oregon be and it hereby is authorized and directed to reopen the case and claim of said Bertha Bergerson for compensation, and to give a full hearing upon the merits thereof, and upon or

after such hearing to make a final order therein, with the right of appeal of said Bertha Bergerson to the courts from such final order, in accordance with the provisions of the workmen's compensation act."

Thereupon a contributor to the Industrial Accident Fund brought the action to have the act declared unconstitutional and to enjoin the State Industrial Accident Commission from further proceeding. In sustaining a decree in favor of the contributor, the court said:

"There are other serious constitutional objections to chapter 69 of the Laws of 1931, above quoted.

" 'Since the legislature does not possess and may not assume the exercise of judicial power, it cannot interfere in any way with pending judicial controversies. Therefore the legislature cannot annul or set aside the final judgment of a court of competent jurisdiction, or take particular cases out of a settled course of judicial proceedings, or grant a rehearing or appeal after the parties to a final judgment have lost the right to any further hearing, or set aside the judgments of courts, or revive judgments which have expired, or grant new trials, or order the discharge of offenders, or require that a certain deposition shall be read in the trial of a cause then pending, or provide for the sale of a decedent's land without notice to the heirs, and for the application of the proceeds to certain claims, or direct the steps which shall be taken in the progress of a judicial inquiry. The result of any other rule would be seriously to interfere with the discretion and independence of the judiciary.' 6 R. C. L., §163, p. 162.

"The decisions are almost unanimous in support of the text.

"Such legislation is repugnant to the principles of 'checks and balances' on which the governments of the state and nation are founded. Macartney v.

Shipherd, 60 Or. 133, 117 P. 814, Ann. Cas. 1913D, 1257.

"No law shall be passed granting to any citizen or class of citizens, privileges or immunities which, upon the same terms, shall not equally belong to all citizens. Constitution of Oregon, Article 1, §20.

"This section of the Constitution has been before the court many times and in many different phases, but the reasoning and logic of all the decisions are against the validity of such legislation. The Law of 1931, herein complained of, attempts to confer the special privilege upon the appellant to have her claim adjudicated in a way not given to any other litigant.

"If the Legislature has authority to pass such an act regarding individual claims against the State Industrial Accident Commission, would it not have the same right in regard to any other litigation before the courts?"

In *State v. Industrial Accident Board*, 23 Pac. (2d) 253, 256 (Mont. 1933), an original proceeding for prohibition was instituted. It was held that a special act authorizing an employee to present and prosecute a claim theretofore barred under the Woakmen's Compensatoin Act was unconstitutional, and the writ issued, the court stating:

"It applies by its very terms to but one individual and leaves all others in the same circumstances subject to the provisions of the general statute. It likewise renders some employers subject to compensation suits, previously barred by the statutes, without imposing a like burden upon others of the same class."

See also: *Casparis v. Fidelity Union Co.*, 65 S. W. (2d) 404 (Tex. 1933).

The foregoing decisions require no comment. A careful research has failed to reveal any reported state or federal decision upholding or validating an act similar to Private Act No. 445.

CONCLUSION.

It is respectfully submitted that Private Act No. 445 is violative of the "due process" clause of the Fifth Amendment to the Constitution of the United States and that the compensation order and award of March 13, 1939, made under the purported authority of said Private Act is therefore void, and it is respectfully prayed that this Court reverse the decree appealed from, declare said Private Act No. 445 unconstitutional and said compensation order void, and direct the District Court to enter a permanent injunction as prayed for.

Respectfully submitted,

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of Counsel.

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DISTRICT COURT'S DECISION
27 F. Supp. 823 (Adv. Op.)

IN THE UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

In Admiralty Nos. 47 and 48

PARAMINO LUMBER COMPANY, a corporation, and UNION INSURANCE SOCIETY OF CANTON, LTD., a corporation, Libelants,

vs.

WM. A. MARSHALL, Deputy Commissioner, Fourteenth Compensation District under the Longshoremen's and Harbor Workers' Compensation Act, and JOHN T. CLARK, Respondents.

Bogle, Bogle & Gates and Stanley Long, Seattle, Washington, Attorneys for Libelants.

J. Charles Dennis, United States Attorney, Seattle, Washington, Gerald Shucklin, Asst. United States Attorney, Seattle, Wash., Attorneys for Respondent Marshall.

Oscar A. Zabel, Seattle, Washington, Attorney for Respondent Clark.

Before Healy, Circuit Judge, and Cushman and Bowen, District Judges.

MEMORANDUM OPINION—Filed May 10, 1939

Some of the historical background of these cases may be found in the decisions of the District Court, 18 F. Supp. 645, and of the Ninth Circuit Court of Appeals, 95 F. (2nd) 203.

These are two consolidated suits in admiralty before this 3-judge court, convoked pursuant to 28 U. S. C. A., Sec. 380a, brought by libelants employer and insurance carrier against respondents Deputy Commissioner and John T. Clark for temporary, interlocutory and permanent injunctive relief against Private Act No. 445

of the 74th Congress (H. R. 4439) for the relief of John T. Clark, and against a supplemental order and award of compensation of more than $4,000 made under that Private Act to Clark, a longshoreman, upon the alleged ground that the Private Act and award are illegal, unconstitutional and void, in that they (as Libelants allege) deny to libelants the equal protection of the laws and deprive them of their property without due process of law contrary to the Fifth and Fourteenth Amendments.

Cause No. 47 was commenced as an independent equity suit and Cause No. 48 was commenced as a suit for review by the District Court of the Deputy Commissioner's supplemental award. The causes have been consolidated and transferred to the admiralty side of the court. Both seek the same injunctive relief above noted. Respondents except to the libels on the ground that the libels do not state sufficient facts for the relief demanded. The sole question for decision is whether the Private Act is constitutional and a valid amendment to the Longshoremen's and Harbor Workers' Compensation Act (Title 33 U. S. C. A., Secs. 901, et seq.). Respondents contend that it is valid because it affects only the remedy and not the right of John T. Clark. Libelants insist that the Private Act is unconstitutional and void because the rights of the parties had been fixed by a previous binding award of compensation which cannot be changed by the effect of the Private Act giving as it does private relief only to Clark and to no else similarly situated.

The questioned Private Act of Congress provides as follows:

"An Act

For the Relief of John T. Clark, of Seattle, Washington.

"*Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled,* That, in the case of John T. Clark, of Seattle, Washington, whose disability compensation under the Longshoremen's and Harbor Workers' Compensation Act of March 4, 1927, was terminated as of July 5, 1931, by a compensation order filed August 26, 1931, the Employees' Compensation Commission be, and it is hereby, authorized

and directed to review such order in accordance with the procedure prescribed in respect of such claims in section 19 of said Act, and in accordance with such section to issue a new compensation order which may terminate, continue, increase, or decrease such compensation, the provisions of sections 21 and 22 of the said Act, as amended, to the contrary notwithstanding: Provided, that such new order shall not affect any compensation paid under authority of the prior order.

"Approved, April 10, 1936."

BOWEN, District Judge:

Much of what is stated in the following quotations was said with reference to state statutes, but the principles stated apply equally to Acts of Congress.

"A presumption in favor of constitutionality is raised by the mere fact of the enactment of a statute by the legislature; and the burden of showing that it is unconstitutional is on the party asserting it. * * *" 12 C. J. 791-794. "As to the degree and extent of this presumption, the rule, as variously stated, is that every reasonable presumption will be made in favor of the validity of a statute; * * * and also that doubt, a fair doubt, a serious doubt, any, and all, doubts, and every reasonable doubt as to the constitutionality of a statute will be resolved in favor of its validity; * * *." 12 C. J. 794-795. " * * * Other statements are that, where doubt exists whether there is a conflict between the statute and the constitution, the statute must prevail, and that the statute must be upheld unless its invalidity appears beyond all doubt, * * *." 12 C. J. 798.

In Williams vs. Norris, 25 U. S. 72, (12 Wheat. 117), one question was which one of two persons had the paramount title in certain lands. Norris claimed that his title was perfected by proceedings under a statute of the state of Tennessee entitled "an act for the relief of Ezekiel Norris," which provided; "Be it enacted," etc., that the commissioner of West Tennessee be, and he is hereby authorized to issue to Ezekiel Norris, certificates or warrants to the amount of 2,280 acres, being the amount of two entries, No. 2,046 for 1,000 acres and

No. 2,047 for 1,280 acres, on which no warrants or grants were issued; provided, that the said Ezekiel Norris shall produce sufficient evidence to the said commissioner that the consideration for said entries was paid, and that no warrant or grant ever issued on said entries."

Williams contended that statute was unconstitutional, but the court overruled that contention and at pages 80-81 (12 Wheat. 127-128) by Marshall, C. J., said: "What difference is there, so far as respects its constitutionality, between the act passed in his (Norris') particular case, and the act containing a general reference of all cases of the same description to the commissioner? * * *. There are, undoubtedly, great and solid objections to legislation for particular cases. But these objections do not necessarily make such legislation repugnant to the constitution of the United States."

That old case of Williams v. Norris, supra, decided in 1827, may be somewhat involved on the facts, but it is clear that in that case Chief Justice Marshall overruled the constitutional objection to a private act of a state legislature for the perfection of one man's title to land against the adverse claims of another man, and held in effect that the fact that legislation is for the private relief of one man in his relationship with another does "not necessarily make such legislation repugnant to the contitution of the United States." Counsel have not cited and the writer of this opinion is not advised of any later Supreme Court case overruling that judgment of Marshall. That situation, until unmistakably cleared up by later Supreme Court decision, renders this three-judge District Court unable to rule without doubt that the Private Act of Congress for the relief of John T. Clark here assailed is unconstitutional. Since its invalidity is not so free from doubt as to overcome the presumption of its validity, the Private Act must be upheld by this court.

The exceptions to the libels will be sustained. An order or orders carrying the foregoing ruling into effect may be settled upon notice or stipulation.

——— ———, Circuit Judge; Edward E. Cushman, District Judge; John C. Bowen, District Judge.

IN UNITED STATES DISTRICT COURT
In Admiralty Nos. 47 and 48
(Title omitted)

DISSENTING OPINION—Filed May 10, 1939

HEALY, Circuit Judge, dissenting:

I regret my inability to agree with my associates, but the invalidity of the private act does not seem to me doubtful.

The beneficiary of the act, Clark, was injured in January, 1931, while in the employ of the libellant Paramino Lumber Company. A claim for compensation was filed by Clark. Upon hearing before the deputy commissioner in August, 1931, an award of compensation was made in which it was determined that the claimant had been wholly disabled from the time of the injury to July 5, 1931, but had recovered from his injury and disability on the latter date. The employer and the insurance carrier paid compensation for the period of disability, pursuant to the order. Under the terms of the Longshoremen's Act (Sec. 21 (a); 33 U. S. C. A., Sec. 921 (a)) the compensation order became final at the expiration of thirty days thereafter, there having been no proceeding to suspend or set it aside.

So far as material here, Sec. 22 of the Longshoremen's Act, in effect then as now, provides that upon his own initiative, or upon the application of any party in interest, on the ground of a change in condition or because of mistake in a determination of fact, the deputy commissioner may review a compensation case, at any time prior to one year after the date of the last payment of compensation, and may issue a new compensation order continuing, reinstating or increasing compensation. No review was had of the case as permitted by this provision. On April 10, 1936, Congress passed the private act in question. The original order confessedly involved no fraud, and it is conceded that the award now sought to be enjoined was made solely under authority of the special act.

There are doubtless many instances in which injured longshoremen have found themselves in the unfortunate plight of Mr. Clark. Compare, for example, the facts in Kobilkin v. Pillsbury, 9 Cir., 103 F. (2d) 667. I cannot but believe that the private act, singling out as it does the libellants for the imposition of a burden not imposed by Congress on others in like situation, impinges on their constitutional rights guaranteed by the due process clause of the Fifth Amendment. The arbitary nature of the act is unrelieved by any asserted distinction which might serve to differentiate the obligation of these parties from that of other employers or insurance carriers in like circumstances. What Congress has done is to authorize an award of money for the relief of a private individual, payable not out of the public treasury, but out of the pockets of other private parties guilty of no fault. The statute involved in Williams v. Norris, 25 U. S. 72, appears to have been purely remedial, and I see nothing in that decision which would support this legislation.

I think the statute is invalid on grounds apart from the frailities just discussed. It purports to extend or remove the time limits imposed by Secs. 21 and 22 of the Longshoremen's Act, and is applicable only in a case where these time limits had already expired. In Danzer & Co. v. Gulf & Ship Island Railroad Co., 268 U. S. 633, the court dealt with a parallel situation. It was there pointed out that the Interstate Commerce Act created a cause of action against the carrier (in that case the right to damages for misrouting) and at the same time operated as a limitation upon liability. It was held that in the case of such statutory causes of action the lapse of the time limit not only bars the remedy but destroys the liability; and to give the statute a retroactive effect would be to deprive the carrier of its property without due process of law in contravention of the Fifth Amendment.

Similarly, the Longshoremen's Act (Sec. 4) creates a cause of action for compensation, irrespective of fault. It also limits the time within which an award of additional compensation may be made by the deputy com-

nissioner. This period had expired prior to the enact-
nent of the private act here in question. As of the latter
late liability no longer existed. Thus the act not only
upplies a remedy but necessarily imports the creation
f a new liability.

It would seem that the principle of the Danzer case is
equally applicable to general and to private statutes,
however free from other infirmities the latter may be.

I think the restraining order heretofore granted should
e made permanent.

Wm. Healy, U. S. Circuit Judge.

COMPENSATION ORDER AND AWARD OF AUGUST 26, 1931

UNITED STATES EMPLOYEES' COMPENSATION COMMISSION, FOURTEENTH COMPENSATION DISTRICT

In the Matter of the Claim for Compensation Under the Longshoremen's and Harbor Workers' Compensation Act

JOHN T. CLARK, Claimant,

against

SS. "DOROTHY WINTERMOTE" and/or PARAMINO LUMBER COMPANY, Employer, Union Insurance Society of Canton, Ltd., Insurance Carrier

Compensation Order, Award of Compensation, Case No. 104-19

Such investigation in respect to the above entitled claim having been made as is considered necessary and a hearing having been duly held in conformity with law,

The Deputy Commissioner makes the following Finding of Fact:

That on the 17th day of January, 1931, the claimant above named was in the employ of the employer above named at Seattle, in the State of Washington in the Fourteenth Compensation District, established under the provisions of the Longshoremen's and Harbor Workers' Compensation Act, and that the liability of the employer for compensation under said Act was insured by the Union Insurance Society of Canton, Ltd.; that on said day claimant herein, while performing service for the employer upon the navigable waters of the United States, sustained personal injury resulting in his disability while he was employed as a longshoreman on board the steamship "Dorothy Wintermote," said steamship being then afloat at Seattle, in the State of Washington; that while the claimant above named was so employed, he slipped and fell against a pile of lumber, sustaining a fracture of the 10th rib on the left side, and resulting in his disability; that notice of injury was given within thirty

days after the date of such injury to Deputy Commissioner and to the employer; that the employer furnished claimant with medical treatment, etc in accordance with section 7 (a) of the said Act, that the average annual earnings of the claimant herein at the time of his injury amounted to the sum of $900.00; that as the result of the injury sustained the claimant was wholly disabled from January 17, 1931, to and including July 4, 1931, and he is entitled to 24-1/7 weeks' compensation, $11.54 per week, for such disability; that the claimant had recovered from his injury on July 5, 1931; that the employer has paid $331.20 to the claimant as compensation.

Upon the foregoing facts, the Deputy Commissioner makes the following award:

That the employer, SS. "Dorothy Wintermote" and/or Paramino Lumber Company, and the insurance carrier, Union Insurance Society of Canton, Ltd., shall pay to the claimant compensation as follows: $278.61; that the employer shall have credit on this Award for $331.20 previously paid to the claimant as compensation.

Given under my hand at Seattle, Washington, this 26th day of August, 1931.

(S.) Wm. A. Marshall, Deputy Commissioner,
Fourteenth Compensation District.

Proof of Service

I hereby certify that a copy of the foregoing Compensation Order was sent by registered mail to the Claimant the Employer, and the Insurance Carrier at the last known address of each as follows:

Mr. John T. Clark, 808—7th Ave., Seattle, Washington.

SS. "Dorothy Wintermote" and/or Paramino Lumber Co., No. 1 Drumm Street, San Francisco, California.

Union Insurance Society of Canton, Ltd., 1425 Dexter Horton Bldg., Seattle, Washington, care Mr. Pelly.

Mr. Samuel B. Bassett, 511 Alaska Bldg., Seattle, Washington.

Mailed August 26, 1931.

(S.) Wm. A. Marshall, Deputy Commissioner.

COMPENSATION ORDER AND AWARD OF MARCH 13, 1939

UNITED STATES EMPLOYEES' COMPENSATION COMMISSION,
FOURTEENTH COMPENSATION DISTRICT

Case No. 104-19

In the Matter of the Claim for Compensation under the Longshoremen's and Harbor Workers' Compensation Act.

JOHN T. CLARK, Claimant

against

SS. "DOROTHY WINTERMOTE" and/or PARAMINO LUMBER COMPANY, Employer, Union Insurance Society of Canton, Ltd., Insurance Carrier.

COMPENSATION ORDER, AWARD OF COMPENSATION

By authority of the provisions contained in Private Act No. 445, 74th Congress, approved April 10, 1936, hearings were held by the Deputy Commissioner on November 22, 1938, and on January 5, 1939, and the Deputy Commissioner having been authorized by the United States Employees' Compensation Commission to make findings of fact and an order and award of compensation, and such an order or award of compensation as may be indicated by such findings,

The Deputy Commissioner makes the following Findings of Fact:

That on the 17th day of January, 1931, the claimant above named was in the employ of the employer above named at Seattle, in the State of Washington in the Fourteenth Compensation District, established under the provisions of the Longshoremen's and Harbor Workers' Compensation Act, and the liability of the employer for compensation under said Act was insured by the Union Insurance Society of Canton, Ltd.; that on said day claimant herein, while performing service for the employer upon the navigable waters of the United States, sustained personal injury resulting in his disability while

he was employed as a longshoreman on board the steamship "Dorothy Wintermote," said steamship being then afloat at Seattle, in the State of Washington; that while the claimant above named was so employed he slipped and fell against a pile of lumber, sustaining a fracture of the 10th rib on the left side, and resulting in his disability; that notice of injury was given within thirty days after the date of such injury to the Deputy Commissioner and to the employer; that the employer furnished claimant with medical treatment, etc., in accordance with section 7 (a) of the said Act; that the average annual earnings of the claimant herein at the time of his injury amounted to the sum of $900.00; that as the result of the injury sustained the claimant was wholly disabled from January 17, 1931, to and including January 5, 1939, and he is entitled to 415-6/7 weeks' compensation at $11.54 per week for such disability and amounting to the sum of $4,798.99; that the total disability of the claimant continued at the time of the hearing on January 5, 1939; that the employer has paid $331.20 to the claimant as compensation; that Oscar A. Zabel, attorney, has rendered legal services to claimant of the reasonable value of $200.00 and he is entitled to a lien on compensation due claimant therefor. Upon the foregoing facts the Deputy Commissioner makes the following Award:

That the employer, SS. "Dorothy Wintermote" and/or Paramino Lumber Company, and the insurance carrier, Union Insurance Society of Canton, Ltd., shall pay to the claimant compensation as follows: 415-6/7 weeks' compensation at $11.54 per week covering the period from January 17, 1931, to and including January 5, 1939, and amounting to the sum of $4,798.99, less $200.00 to be deducted therefrom and paid Oscar A. Zabel as his attorney; that the employer shall have credit on this award for $331.20 previously paid to the claimant as compensation; that subsequent to January 5, 1939, the employer and insurance carrier shall pay compensation to the claimant bi-weekly at the rate of $11.54 per week; that the employer and insurance carrier shall furnish claimant with such medical, surgical and hospital treat-

ment as may be appropriate to the further treatment and cure of his disability.

Given under my hand at Seattle, Washington, this 13th day of March, 1939.

(Signed) Wm. A. Marshall, Deputy Commissioner, Fourteenth Compensation District.

PROOF OF SERVICE

I hereby certify that a copy of the foregoing compensation order was sent by registered mail to the claimant, the employer and the insurance carrier, at the last known address of each as follows:

Mr. John T. Clark, 220-9th Ave., Seattle, Wn.

SS. "Dorothy Wintermote" and/or Paramino Lumber Co., No. 1 Drumm St., San Francisco, Cal. Union Ins. Society of Canton, Ltd., Care Bogle, Bogle & Gates, Central Bldg., Seattle, Wn.

Oscar A Zabel, Atty., 4th and Pike Bldg., Seattle, Wn.

(Signed) Wm. A. Marshall, Deputy Commissioner.
Mailed March 13, 1939.

REPORT OF SENATE COMMITTEE ON CLAIMS (PRIVATE ACT 445)

74TH CONGRESS
2d Session

SENATE

CALENDAR No. 1711
REPORT
No. 1645

JOHN T. CLARK

FEBRUARY 24 (calendar day, MAR. 5), 1936.—Ordered to be printed.

MR. SCHWELLENBACH, from the Committee on Claims, submitted the following

REPORT

(To accompany H. R. 4439)

The Committee on Claims, to whom was referred the bill (H. R. 4439) for the relief of John T. Clark, of Seattle, Wash., having considered the same, report favorably thereon with the recommendation that the bill do pass without amendment.

The facts are fully set forth in House Report No. 1892, Seventy-fourth Congress, first session, which is appended hereto and made a part of this report.

(H. Rept. No. 1892, 74th Cong., 1st sess.)

The Committee on Claims, to whom was referred the bill (H. R. 4439) for the relief of John T. Clark, of Seattle, Wash., having considered the same, report thereon with the recommendation that it do pass with the following amendment:

Strike out all of the bill after the enacting clause and insert in lieu thereof the following:

"That, in the case of John T. Clark, of Seattle, Washington, whose disability compensation under the Longshoremen's and Harbor Workers' Compensation Act of

March 4, 1927, was terminated as of July 5, 1931, by a compensation order filed August 26, 1931, the Employees' Compensation Commission be, and it is hereby, authorized and directed to review such order in accordance with the procedure prescribed in respect of claims in section 19 of the said Act, and in accordance with such section to issue a new compensation order which may terminate continue, increase, or decrease such compensation, the provisions of sections 21 and 22 of the said Act, as amended, to the contrary notwithstanding: *Provided*, That such new order shall not affect any compensation paid under authority of the prior order."

STATEMENT OF FACTS

As amended, this bill will authorize the Employees' Compensation Commission to reopen the case of John T. Clark, of Seattle, Wash. In order that the purpose of this bill may be understood, it becomes necessary to briefly discuss the Longshoremen's and Harbor Workers' Compensation Act. Said act places the liability for injuries sustained by longshoremen and harbor workers upon the employer, who in turn may insure his risk. The administration of the act was placed in the hands of the Employees' Compensation Commission, and local administration is accomplished through deputy commissioners, who have power to hold hearings and make final orders of compensation. Section 19, subsection c, states:

"The deputy commissioner shall make or cause to be made such investigations as he considers necessary in respect of the claim, * * *."

And in the same section, subsection h, it is stated:

"An injured employee claiming or entitled to compensation shall submit to such physical examination by medical officer of the United States or by a duly qualified physician designated or approved by the Commission as the deputy commissioner may require."

The facts in this case disclose that on January 17, 1931, John T. Clark while employed as a longshoreman on the steamship *Dorothy Wintermote* at Seattle was

going from one hatch to another when he slipped in going over the cargo and fell against a pile of lumber. As is shown in the later testimony of three physicians, he sustained a fracture of the eleventh rib about 3 inches from the front end. Clark was employed by the Paramino Lumber Co., and employers' compensation insurance was carried by the Union Insurance Co., of Canton, Ltd.

Within 30 days the employer and the deputy commissioner of the Employees' Compensation Commission were notified of the injury, as required by said act, and the employee Clark was sent to the company's physician, Dr. Edmund H. Smith. The employee claims malpractice by Dr. Smith in that the injured eleventh rib was not treated, but instead, the physician, after some preliminary treatments, removed a part of the twelfth rib and discharged Clark while he was apparently still suffering from the original injury. The operation took place on May 12, 1931. Dr. Smith testified that he examined the eleventh rib and found a good union, but as compared with testimony submitted by other physicians, the same does not appear to be a fact. Following are affidavits by two physicians on this point.

MARCH 8, 1935.

RE: JOHN T. CLARK

To whom it may concern:

Mr. Clark came under my care July 12, 1931, for treatment of an injury received while employed by the McCormick Steamship Co. as a stevedore on the steamship *Dorothy Wintermote.*

May 12, 1931, the tip of the twelfth rib was removed by Dr. E. H. Smith. That patient still complained of pain in his left side and was unable to return to his former duties.

X-rays by Dr. J. T. Dawson, July 1931, disclosed a fracture of the eleventh rib, left side, slightly posterior to the axillary border, with the distal fracture displaced slightly upward and backward.

He has been totally incapacitated since the date of

the accident. His condition due to the un-united eleventh rib, can be corrected only by a surgical operation.

Yours truly,

U. C. BATES, M. D.

MARCH 8, 1935.

CLARK, MR. JOHN T., REPORT

This man gives a history of an injury to the lower chest on January 17, 1931. He sustained facture of the eleventh rib, about 3 inches from the anterior end.

On May 12, 1931, an operation was performed by his attending surgeon, and the tip of the twelfth rib was removed. This operation gave him no relief, so on November 30, 1931, I operated on the eleventh rib to fuse the fragments of this broken rib together.

The rib healed following the operation, but he has continued to complain of pain in this region.

H. J. WYCKOFF.

Name: Clark, John T. Date: July 13, 1931.
Case: Ribs.
Referred by Dr. U. C. Bates.

X-ray findings: Antero-posterior and semilateral plates show a fracture of the 11th rib, left side, slightly posterior to the axillary border, with the distal fracture displaced slightly upward and backward. No callous is noted.

Plates also show extensive hypertrophic arthritis of the spine.

J. T. DAWSON, M. D.

The employer started payment of compensation in installments from the date of injury and these continued until July 4, 1931, at the rate of $13.80 per week, amounting in all to $331.20. A little over a month after Dr. Smith performed his operation, that is, on June 18, 1931.

e claimed his patient had completely recovered. The mployer stopped paying compensation. The claimant rotested to the Deputy Commissioner at Seattle, Mr. Villiam A. Marshall, and the latter ordered a hearing n August 4, 1931. At this hearing the Deputy Commissioner found that the claimant had recovered from is injury as of July 5, 1931, apparently as the result of Dr. Smith's testimony, and he terminated the claimant's ompensation as of that date.

It is to be noted that under the said act, the Deputy ommissioner occupies a position of peculiar responsibility. He is neither the agent of the employer nor the mployee, but is an agent of the Government to protect he rights of both parties, and as such, he should exercise pecial care in his decisions.

The original act in section 22 provided that on the round of a change in conditions or because of a mistake n a determination of fact by the deputy commissioner, compensation case might be reviewed and a new compensation order issued. This right was made subject to time limit, as follows:

"Any time during the term of an award and after the ompensation order in respect of such award has become inal."

The Employees' Compensation Commission states that his provision has been interpreted by the courts as uthorizing such review only upon application made during the term of an award and not beyond such term.

In this case the deputy commissioner terminated the ompensation award as of a date prior to the final compensation order. Consequently, the claimant had no pportunity to apply for a review of the case. His only emedy, if remedy it can be called, would be within 30 lays of the Commissioner's order to appeal to the district court. The court decisions consistently hold in uch cases that the court will not assume jurisdiction to ry factual questions; the court's sole function is said o be to decide whether the Commissioner's action is in ccordance with law, and the law in this case has vested inal decision on the facts in the deputy commissioner.

Now, as heretofore stated, the law impliedly requires a physical examination by a medical officer of the United States, or by duly qualified physicians selected by the deputy commissioner. As a matter of fact, all that the commissioner did was to take the word of the doctor paid by the employer company. After repeated protests by the injured employee, the deputy commissioner, according to his own statement, called in no other physician except an orthopedist. The name of this doctor is not stated in a letter submitted by the deputy commissioner and there is no other record of such an examination.

Your committee is frank to admit that it has had no other cases of this kind, and that, as stated by the Employees' Compensation Commission, a private act of this nature might be successfully attacked by the employer or the insurance company in the courts. However, evidence of the claimant's present and past continuing disability is given by physicians and others, and it appears that the claim of malpractice by the company physician and of lack of due care of the claimant's interests by the deputy commissioner has been sustained. It is clear that Clark is at the present time hopelessly crippled and without compensation as a result of the foregoing, and we can see no objection to this bill, as amended, which gives the permission and authority of Congress for a review of the case by the Employees' Compensation Commission, the body charged with the administration of the Longshoremen's and Harbor Worker's Act.

There is appended hereto letters from the Employees' Compensation Commission.

UNITED STATES EMPLOYEES' COMPENSATION COMMISSION.

Washington, March 23, 1935.

CHAIRMAN, COMMITTEE ON CLAIMS,

House of Representatives, Washington, D. C.

DEAR MR. CHAIRMAN: The Commission has received your request for its report upon the bill (H. R. 4439)

for the relief of John T. Clark, of Seattle, Wash. The bill provides: "That the Secretary of the Treasury be, and he is hereby, authorized and directed to pay, out of any money in the Treasury of the United States not otherwise appropriated, to John T. Clark, of Seattle, Wash., the sum of $5,000, being full compensation for disability resulting from injuries received by him as a longshoreman subject to the Longshoremen's and Harbor Workers' Compensation Act, such disability, however, being directly due to faulty diagnosis and improper treatment by the attending physician, and the failure of the deputy commissioner to provide examination by a competent and impartial physician, as provided by law."

The records of the Commission show that John T. Clark sustained an injury on January 17, 1931, while performing service for his employer, the Paramino Lumber Co., owner of the steamship *Dorothy Wintermote*, on which he was working at the time. Claim for compensation was filed under the provisions of the Longshoremen's and Harbor Workers' Compensation Act of March 4, 1927 (33 U. S. C., ch. 18, sec. 901 et. seq.), which is administered by this Commission through deputy commissioners in the several compensation districts established by it throughout the United States. The injury in the present case arose in the fourteenth compensation district under the jurisdiction of Deputy Commissioner William A. Marshall, whose office is located at Seattle, Wash.

The injury as reported by the employer was sustained when the employee "slipped and fell against pile of lumber," resulting, as stated by the employer, in a fracture of the tenth rib, although the medical testimony and medical reports in the case indicate that it was in fact the eleventh rib that had been fractured. Compensation was paid for said injury by the insurance carrier of the employer without an award, in accordance with the provisions of section 14 of the Longshoremen's Act, from the date of injury to July 4, 1931, 24 weeks' compcompensation at the rate of $13.80 per week, amounting to the sum of $331.20.

A hearing was held in this case before the deputy commissioner on August 4, 1931, as provided by section 19 of the Longshoremen's Act, upon the claim for compensation filed by Mr. Clark, on July 16, 1931, at which time the claimant was represented by counsel. On August 26, 1931, the deputy commissioner filed a compensation order, award of compensation, finding therein that the claimant was wholly disabled from the date of injury, January 17, 1931, to and including July 4, 1931, and that the claimant had recovered from his injury on July 5, 1931. A copy of the said compensation order awarding compensation for 24-1/7 weeks at the compensation rate of $11.54 per week is transmitted herewith for the fuller information of the committee.

It appears from the record in this case that the employer furnished the claimant with medical tre ment as required by section 7 (a) of the Longshoremen's Act. The employer's physician was Dr. Edmund H. Smith of Seattle, who performed an operation upon the claimant on May 12, 1931, at the Seattle General Hospital. This operation, as shown by the transcript of testimony taken at the hearing before the deputy commissioner, consisted of removal of the end of the twelfth rib, where pain had localized, and removal of scar tissue that had formed apparently from the tearing of the end of the cartilage of the rib. Dr. Smith testified at the hearing that at that time he investigated the site of the fracture of the eleventh rib and found there a good, firm, fibrous union.

The records of the deputy commissioner contains a medical report dated February 2, 1932 (after the jurisdiction of the deputy commissioner over the case had terminated), from Dr. H. J. Wyckoff of Seattle, showing that following the claimant's complaint of pain and disability he had, on November 30, 1931, performed an operation by removing small bone chips and placing them along the line of fracture of the eleventh rib, after freshening up the bone ends. The deputy commissioner advised the Commission that he did not have any knowledge of this operation until some months thereafter, and that according to his understanding the operation was performed through the local county hospital.

The medical and hospital treatment and care in this case, and the services of Dr. Edmund H. Smith, were furnished pursuant to the provisions of section 7 (a) of the Longshoremen's Act, which places the obligation to furnish such care and treatment directly upon the employer. The deputy commissioner under the law has no part in the selection of the employer's physician or surgeon, or authority over the nature of treatment to be furnished. The deputy commissioner did, however, under authority of section 7 (b) of the act, refer Mr. Clark to Dr. Roger Anderson, of Seattle, orthopedist, on July 7, 1931, for an impartial examination relative to the claimant's physicial condition; and the claimant was also examined by other physicians.

As stated above, the deputy commissioner found from the evidence taken at the hearing on August 4, 1931, including the report of the impartial physician, that the claimant had recovered from his injury on July 5, 1931, and incorporated a finding of fact to that effect in the compensation order filed on August 26, 1931. Had the claimant or counsel then representing him felt that the compensation order was "not in accordance with law," the claimant had the right, under section 21 of the Longshoremen's Act, to apply to the United States district court for the judicial district in which the injury occurred for a judicial review of the compensation order. This action apparently was not taken, although it appears from the deputy commissioner's file that Mr. Clark was represented in succession by several different attorneys.

At the time of the injury, and at the time final action was taken upon this case by the deputy commissioner, as well as when complaint of the surgical treatment administered was made to the deputy commissioner, the only provision authorizing the deputy commissioner to review a compensation order was that contained in section 22 of the Longshoremen's Act as originally passed. This section limited the power of the deputy commissioner to review a case to "any time during the term of an award and after the compensation order in respect to such award has become final." This provision has been inter-

preted by the courts as authorizing such review only upon application made during the term of an award, and not beyond such term.

This provision was obviously very restrictive, and probably has worked a hardship, by preventing review of a case by the deputy commissioner after the term of the award had expired, not only in Mr. Clark's case but in other cases as well, some of which have come to the Commission's attention. The Commission from time to time in its annual reports since the passage of the Longshoremen's Act suggested that Congress should amend the provisions of section 22 so as to enlarge the power of a deputy commissioner to review a case, but it was not until May 26, 1934, that section 22 was amended. Such amendment was not retroactive, however, and cannot be construed as applying to Mr. Clark's case. Moreover, the amendment contains a provision limiting the power to review a compensation order to "1 year after the date of the last payment of compensation."

As the last payment of compensation was made in 1931, the deputy commissioner was obviously without authority to reopen this case under the amended provision (even if such provision were retroactive) just as he had been without such authority when the need for such action was first urged upon him by and on behalf of Mr. Clark.

In connection with the declaration in the bill as to Mr. Clark's disability "being directly due to faulty diagnosis and improper treatment by the attending physician, and the failure of the Deputy Commissioner to provide examination by a competent and impartial physician as provided by law" (lines 10-14), the committee's attention is invited to the salient facts of this case as set forth above. Even if errors of judgment occurred on th part of the Deputy Commissioner, as well as on the part of the physicians and surgeons in the original handling of this case, as might be inferred from the complaints subsequently made, nothing in the case indicates that the Deputy Commissioner acted otherwise than honestly and conscientiously in the discharge of his official duty in connection with the case, and the Commission believes

that the severe stricture upon his official conduct as proposed in the bill is unwarranted.

The attention of the committee is further invited to the fact that even if the disability of Mr. Clark for which the bill proposes to grant relief is the result of a medical or surgical mistake or mistakes in the treatment of his injury, such treatment was not given by any physician or surgeon in the employ of the United States, but by those provided by the private employer of Mr. Clark whose duty it was under the law to provide such treatment, and possibly by others whose services were otherwise procured.

The proposed measure, if enacted, would authorize and direct the Secretary of the Treasury to pay to John T. Clark the sum of $5,000 as "full compensation for disability resulting from injuries received by him as a longshoreman subject to the Longshoremen's and Harbor Workers' Compensation Act," and apparently would impose no duty upon this Commission in connection with such payment. Nevertheless, and without going further into the case or undertaking here to develop fully the principles involved, the Commission feels compelled to point out to the committee that the assumption on the part of the United States (as this measure would assume, tacitly if not expressly) of responsibility for full relief to persons injured within the purview of the Longshoremen's and Harbor Workers' Compensation Act would set a precedent which might have far-reaching and grave consequences. The Commission feels constrained, therefore, in the public interest, to recommend against the passage of the bill H. R. 4439.

Very truly yours,

(Mrs.) JEWELL W. SWOFFORD, *Chairman.*

UNITED STATES EMPLOYEES' COMPENSATION COMMISSION,

Washington, August 1, 1935.

Hon. AMBROSE J. KENNEDY,
Chairman, Committee on Claims,
House of Representatives, Washington, D. C.

DEAR MR. CHAIRMAN: I have received your letter of July 25, 1935, relative to the matter of the claim of John T. Clark, of Seattle, Wash., who sustained injury on January 17, 1931, while performing service for his employer, the Paramino Lumber Co., owner of the steamship *Dorothy Wintermote*, for whose relief the bill (H. R. 4439) was introduced, proposing to pay him $5,000 out of the Treasury of the United States, for the injuries sustained on January 17, 1931.

You transmit with your letter draft of a bill which has been offered as a substitute for the bill (H. R. 4439), and request an opinion from the Commission as to the effect of said draft should it become a bill and be enacted, and whether the Commission would have any objection to its enactment, or any suggestion as to its form. The draft contains the following:

"That, in the case of John T. Clark, of Seattle, Wash., whose disability compensation under the Longshoremen's and Harbor Workers' Compensation Act of March 4, 1927, was terminated as of July 5, 1931, by a compensation order filed August 26, 1931, the Employees' Compensation Commission be, and it is hereby, authorized and directed to review such order in accordance with the procedure prescribed in respect of claims in section —— of the said act, and in accordance with such section to issue a new compensation order which may terminate, continue, increase or decrease such compensation, the provisions of sections 21 and 22 of the said act, as amended to the contrary notwithstanding: *Provided*, That such new order shall not affect any compensation paid under authority of the prior order."

Under the proposed draft of bill this Commission would be authorized and directed to review the compensation order filed on August 26, 1931, by Deputy Commissioner William A. Marshall, of the fourteenth compensation

district, in Mr. Clark's case, in accordance with the section of the act prescribing the procedure in respect of claims, and to issue a new compensation order therein which may terminate, continue, increase, or decrease such compensation, notwithstanding the provisions of sections 21 and 22 of the Longshoremen's Act. This proposed measure, if enacted, would apparently have the effect of requiring the Commission to reopen Mr. Clark's case for the purpose of modification of the compensation order filed August 26, 1931, so far as the facts when determined upon such review would warrant such modification.

The Longshoremen's and Harbor Workers' Compensation Act affects private employers and employees, and compensation under the act is paid either by the employers, if self-insurers, or by authorized insurance carriers with whom the employers contract with respect to carrying their compensation liability under the act. No liability for the payment of compensation thereunder is imposed upon the United States. The deputy commissioner in the administration of the Longshoremen's Act performs quasi-judicial functions in determining the respective rights of the parties under the act. The adjudication of claims under the act vests a species of property rights in the interested parties which the Commission believes cannot be disturbed after they have become final and no longer subject to review as provided by the act.

The proposed measure, quoted above, would no doubt be open to objection on constitutional grounds, among other things because of its disciminatory nature, in that it would grant a special privilege not accorded equally to other employees under the act. It would also disturb vested rights. Similar State acts, so far as the Commission has noted, have uniformly been held unconstitutional or invalid, and in this connection the committee's attention is called to the following illustrative cases: *Casieri's case* (190 N. E. 118, Mass. 1934); and *Roles Shingle Company v. Bergerson* (19 Pac. (2d) 94, Oreg. 1933.

Aside from the fact that the draft of proposed bill would impose upon the Commission a function in this

particular case which is in the nature of a duty imposed under the Longshoremen's Act upon its deputy commissioners, the constitutional infirmity of the measure would leave little doubt that any order issued thereunder would be successfully attacked in court by the employer or insurance carrier. Accordingly, the Commission respectfully deprecates the submission of this draft as a substitute bill. No change in the language of this draft would seem to be possible which would obviate the underlying reasons against enactment of such a measure.

Very truly yours,

JEWELL W. SWOFFORD, *Chairman.*

UNITED STATES EMPLOYEES' COMPENSATION COMMISSION,
Seattle, Wash., September 6, 1934.

Hon. M. A. ZIONCHECK,
Seattle, Wash.

DEAR SIR: This replies to your letter of September 3, 1934, relative to the case of Mr. John T. Clark, who sustained an injury on January 17, 1931, while employed as a longshoreman and while subject to the Longshoremen's and Harbor Workers' Compensation Act.

A controversy arose as to whether his disability had terminated on July 5, 1931, and a hearing was held on August 4, 1931, to determine the question at issue. The attending physician testified that the disability resulted from a fracture of the eleventh rib and that on May 12, 1931, he operated on the injured man because of persistent complaint of pain; that at time of operation he took off the end of the twelfth rib and also investigated the site of the eleventh rib, finding a good, firm, fibrous union and that he could not move the rib when he pressed on it as hard as he could. He also testified the injured man had recovered on June 18 and was able to resume his employment.

Previous to the hearing, I had an examination of Mr. Clark by an orthopedist and he also stated that in his opinion the injured man was able to resume his employment. A compensation order was accordingly filed on

August 26, 1931, finding that disability had ceased as of July 5, 1931.

No appeal was taken from the order filed, and Mr. Clark visited me from time to time and claimed that disability persisted. Ten months later I learned that he had an operation by Dr. H. J. Wyckoff on November 30, 1931, on the eleventh rib. This was long after my jurisdiction over the case had ceased.

Mr. Clark continued to visit me relative to his disability, and then in the summer of 1933 you took up this case with me and, notwithstanding I had no authority to take any formal action in the matter, I conferred with Dr. Bates and the specialist who had examined Mr. Clark for the county hospital, the purpose being to ascertain if any additional surgical care promised to improve the condition. I concluded that no additional operation was indicated and that the case had developed into one of neurosis.

Obviously, Mr. Clark is not a malingerer, or he would not have submitted to two operations and be willing to undergo an additional operation. His complaints of pain and disability have been so persistent that I was forced to conlude that as a result of all the circumstances he had become neurotic and the original injury is responsible for his condition.

I trust that I have given sufficient details, but will be pleased to furnish any additional information.

Yours truly,

WM. A. MARSHALL,
Deputy Commissioner, District No. 14.

UNITED STATES EMPLOYEES' COMPENSATION COMMISSION,
Washington, November 2, 1934.

Hon. M. A. ZIONCHECK,
Seattle, Wash.

MY DEAR CONGRESSMAN ZIONCHECK: I have received your letter of October 13, 1934, enclosing copies of correspondence, and copy of a statement made to you

by Mr. Clark, relative to the case of John T. Clark, former employee of the Paramino Lumber Co., who sustained injury on January 17, 1931, while performing service for his employer aboard the steamer *Dorothy Wintermote*. Your letter indicates that you believe the Commission should recommend to the Private Claims Committee of the House of Representatives favorable action upon a private relief bill, which I infer will be introduced by you, to provide relief for Mr. Clark by a grant of compensation or similar gratuity by the Federal Government.

Should such a bill be introduced and referred to it the Commission will make report thereon as requested. The Commission would not feel warranted otherwise in addressing the committee, nor would it feel justified in recommending a relief measure of this nature, for reasons which will appear below.

Deputy Commissioner Marshall in his letter of September 6, 1934, advised you of the essential facts upon which his action in Mr. Clark's case was taken. After the hearing held on August 4, 1931, referred to by the deputy commissioner, a compensation order was filed on August 26, 1931, containing among the findings of fact a finding that the employee had recovered from his injury on July 5, 1931. Mr. Clark was at that time represented by counsel. If Mr. Clark or his counsel had felt that the compensation order was "not in accordance with law," proceedings for judicial review of the compensation order as prescribed by section 21 (b) of the Longshoremen's Act, a copy of which is herewith enclosed for convenient reference, might have been instituted. Such proceedings, however, were not instituted and the order became final upon the expiration of the thirtieth day after it was filed by the deputy commissioner.

At the time of the injury and at the time final action was taken upon this case by the deputy commissioner the only provision authorizing the deputy commissioner to review a compensation order was that contained in section 22 of the act as originally passed. You will note that the power to review under section 22 was limited

with respect to time; namely, "at any time during the term of an award and after the compensation order in respect of such award has become final." This provision has been interpreted by the courts as authorizing such review only upon application made during the term of an award, and not beyond such term.

This provision was obviously very restrictive and probably has worked a hardship not only in Mr. Clark's case but in many other cases as well, some of which have come to the Commission's attention. The Commission has suggested in its annual reports since the passage of the act that Congress should amend the provision so as to enlarge the power of a deputy commissioner to review a case, and it was not until May 26, 1934, that section 22 was amended. A copy of the amendment is herewith enclosed for your information. It is not retroactive and cannot be construed as applying to Mr. Clark's case. Moreover, the amendment contains a provision limiting the power to review a compensation order to "one year after the date of the last payment of compensation."

I have carefully considered the suggestion in the last paragraph of your letter, but regret to have to advise you that, as above stated, I cannot see my way clear to make to the Committee on Claims such a recommendation as you suggest. The claimant in this case was not employed by the United States and did not sustain any injury as a result of any service for the United States or as a result of any negligence of an officer or agent of the United States, or as the result of any treatment by a physician employed by the United States. This case arose under the Longshoremen's Act which prescribes benefits to be provided by and on behalf of the private employer and imposes no obligation upon the United States. For this Commission to recommend additional relief by the United States in such a case because of inadequacy of the relief afforded under the Longshoremen's Act would establish a precedent which I do not feel that the Commission could justify. The theory in support of such private relief acts as have come to the attention of the Commission is understood to be that the recipient of the

proposed gratuity has been injured while in the employ of the Government or through the negligence of some officer or agent of the United States, and for some reason or another cannot be compensated under existing law. No case has come to my attention where the Government has by private relief act granted benefits or gratuity to a private employee of a private employer because of injuries sustained under such employment.

I have considered also the possibility of a measure designed to give the Deputy Commissioner continuing jurisdiction over Mr. Clark's case, but such measure would immediately be open to objection on constitutional grounds, among other things because of its discriminatory nature. Similar measures have been passed by State legislatures under workmen's compensation laws and have been nullified by the courts because of the obviously discriminatory nature of such legislation.

For the foregoing reasons I regret to advise you that it will not be possible for me or for the Commission to recommend a private relief act in the case of Mr. Clark.

Very truly yours,

HARRY BASSETT, *Commissioner.*